ABST.

THOMAS CLOUD,

Appellant,

v.

PUBLIC SERVICE STORES,

Defendant,

CHICAGO CITY BANK & TRUST COMPANY,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is a garnishment proceeding in which the judgment plaintiff, Thomas Cloud, appeals from an order dismissing the garnishee, Chicago City Bank and Trust Company.

The record does not include a report of the proceedings at the trial. Therefore, the issue before us is whether the court was justified, upon any basis appearing in the record, in entering the order from which this appeal is taken. We must indulge in all reasonable presumptions based upon the record, that the proceedings in the trial court were in accordance with the law and rules of the court. Rossten v. Wolf, 14 Ill. App.2d 322 (1957).

The record shows that on April 17, 1961, after service of summons on "Public Service Stores, a corporation," an order of default was entered on "Public Service Stores, a corporation"; that on April 26, 1961, a default judgment for

$5,000 was entered for plaintiff and against "defendant, PUBLIC SERVICE STORES, a Corporation"; and that on May 29, 1961, an affidavit for garnishment was filed, reciting that a judgment was rendered against "PUBLIC SERVICE STORES, a Corporation," and that affiant believed that the instant garnishee "is indebted to said Defendant or has effects or estate of said Defendant in its hands."

The record further shows that on June 7, 1961, an order was entered without notice to anyone "that leave be, and the same is hereby given to the Plaintiff to amend Complaint and other documents and forms heretofore filed on their faces, to correct the description of the Defendant PUBLIC SERVICE STORES, from the description, a Corporation, to doing business (D/B/A) under the name of PUBLIC SERVICE STORES."

On June 23, 1961, on a hearing of a motion by the garnishee for discharge upon its answer of no funds, the trial court entered an order which (1) denied the motion of the garnishee to be discharged; (2) made a finding for the "plaintiff and against the garnishee defendant"; (3) ordered the garnishee to amend its answer to show the amount on deposit "in the name of Public Service Stores" on the date of service of summons on garnishee defendant; and (4) continued the cause to June 30, 1961, for "verification of amount on deposit and entry of judgment for the plaintiff."

Subsequently, the garnishee filed amended answers to the interrogatories and alleged that on the date of service of the garnishment summons "one WILLIAM W. LOCKE maintained an individual checking account with this Garnishee in which there was a balance of $3,028.72; that said account was carried by the said WILLIAM W. LOCKE as the sole owner of and under the trade name of PUBLIC SERVICE STORES and that said account was not a partnership account nor a corporate account; and that the only person authorized to deal with said account was the said WILLIAM W. LOCKE, individually. WHEREFORE, this Garnishee prays to be discharged."

After a series of continuances, plaintiff moved the court for judgment for plaintiff and against the garnishee for the sum of $3,028.72, and on the hearing of plaintiff's motion for judgment on September 6, 1961, the court entered an order discharging the garnishee on "its answer of no funds."

It is plaintiff's theory that on September 6, 1961, it was mandatory that the court rule on the only motion actually before it, and the court having made a previous finding for the plaintiff and against the garnishee defendant, it was mandatory that judgment be entered for the plaintiff on the finding for the sum of $3,028.72.

Plaintiff argues that the order entered on June 23, 1961, finding for the plaintiff and against the garnishee, was

a final determination of the liability of the garnishee, and that the order discharging the garnishee without the formal vacation of the order of June 23, 1961, "is void on the face of the record itself and of no legal effect whatsoever." We do not agree.

The existence of a valid judgment against William W. Locke, the alleged depositor, was a jurisdictional prerequisite in this proceeding. The garnishee had the right and duty to show, and to rely on as a defense, that the principal judgment upon which this garnishment proceeding is based is not a proper judgment against its depositor. First National Bank of Palatine v. Hahnemann Institutions of Chicago, Inc., 356 Ill. 366 (1934); Chiaro v. Lemberis, 28 Ill. App.2d 164 (1960).

By the order of June 7, 1961, entered without notice or process, plaintiff sought to use Section 21(4) of the Civil Practice Act, not merely to make a name correction after judgment, but to bring within the judgment a new party, who was not previously before the court, without process. A judgment against a corporation, a legal entity, cannot be corrected to bring within the judgment a new legal entity, without process. The order of June 7 was without legal effect to bring William W. Locke within the judgment theretofore entered against Public Service Stores, a corporation. (49 C.J.S., §244, p.457; 23 I.L.P. Judgments, §§52 and 53.) Therefore, as the answer of the

garnishee alleged that the funds on deposit belonged to William W. Locke, individually, and as there is no contrary evidence preserved in the record that the account was anything other than an individual account, the trial court properly discharged the garnishee.

We are not persuaded by the contention of plaintff that the order of discharge could not properly be entered because the order of June 23, 1961, had never been vacated, and that it was final and res judicata of the principal issue. Plaintiff cites no cases to support this contention.

The trial court was not required to vacate any portion of the order of June 23, 1961, in order to discharge the garnishee on this record. The order was not complete in itself. It was an interim order. It did not terminate the litigation on the merits of the case, but retained the cause for further determination and judment. It was not final and appealable, and further judicial action was required before a judgment could be entered. Until judgment was entered, the trial court could alter, amend, change, or disregard the order. Chechik v. Koletsky, 305 Ill. 518, 519 (1922); Hughs, et al. v. Washington, et al., 65 Ill. 245 (1872).

For the reasons stated, the motions heretofore taken by this court are denied, and the order of September 6, 1961, discharging the garnishee, is hereby affirmed.

AFFIRMED.

BURMAN and ENGLISH, JJ. CONCUR.

Abstract only.

ABST.

(36 I.A.2d 14)

CARROLL CHOUINARD, Appellee,	)	APPEAL FROM
v.	)	MUNICIPAL COURT
	)	OF CHICAGO.
WARREN E. WRIGHT, Appellant.	)	

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant, Warren E. Wright, while engaged in a political campaign, orally employed plaintiff, Carroll Chouinard, as a public relations expert. After the campaign, plaintiff sued defendant to recover an alleged balance due for his services. A jury trial resulted in a $4,000 verdict and judgment for plaintiff. Defendant appealed.

No questions are raised on the pleadings. Defendant's theory is that the verdict is contrary to the manifest weight of the evidence. In order for a verdict to be contrary to the manifest weight of the evidence, where the evidence is conflicting, as in the instant case, an opposite conclusion must be clearly evident. Griggas v. Clauson, 6 Ill. App.2d 412, 419 (1955).

The contract upon which plaintiff's claim is based is alleged to have been entered into at a conference on December 29, 1959, in the Chicago office of Lawrence Morell Gross. The persons present were plaintiff, defendant, Gross, and John W. Damisch.

Each person present at the conference testified. Plaintiff testified that defendant agreed to pay him $5,000 for three months' work during the campaign. This testimony was corroborated by Damisch, who attended the conference at plaintiff's invitation and participated in the negotiations. Defendant testified that

plaintiff's compensation was to be contingent upon receipt of sufficient campaign contributions. The testimony of Gross supported defendant.

Defendant contends that little weight should be given to the testimony of Damisch and argues that although Damisch was not counsel of record, his testimony must be evaluated in the light of the rule "that the attorney who assumes the burden of witness while representing his client in a lawsuit does so at a very great detriment to the credibility of his testimony." (Crescio v. Crescio, 365 Ill. 393, 400 (1937); Wetzel v. Firebaugh, 251 Ill. 190, 198 (1911).) These cases are inapplicable here, where there is nothing in the record to indicate that Damisch was associated in any way with the preparation or trial of the case. The jury was informed that Damisch was a lawyer, had represented plaintiff on prior occasions, and attended the conference at the invitation of Chouinard and participated in the negotiations with defendant.

Gross testified that he was a lawyer, and that it was he who initiated the conference of December 1959; that he acted as an "advisor or consultant" for defendant during the campaign and "often deleted material that Mr. Chouinard had written or put into the releases"; that he had known defendant for thirty years and had been associated with defendant in previous political campaigns; and that he officed with the law firm with which defendant's attorney was associated.

The jury was well informed of any possible bias and interest of both Damisch and Gross. This possibility of interest

did not render either witness incompetent, but was relevant in assessing the credibility of their testimony. Spencer v. Burns, 413 Ill. 240, 247 (1952).

Defendant also contends that plaintiff did not sustain his burden of proving his case by a preponderence of the evidence, and cites Caplow v. Hershon, 331 Ill. App. 267 (1947), and McCue v. Flynn, 327 Ill. App. 222 (1945). These cases state "that a party holding the affirmative of a proposition is required to maintain it by the preponderence of the evidence, which can never be the case when one of two parties equally credible makes an assertion which is denied by the other." In each of these cases the evidence was confined to the opposing testimony of two witnesses, with no additional evidence tending to corroborate the plaintiff's evidence. This rule is not applicable here, where four persons testified, and there were significant contradictions in the testimony given by defendant and his witness, Gross.

In the light of the evenly-balanced and conflicting testimony, it is obvious that the jury's verdict turned upon the credibility of the witnesses. The jury saw and heard the witnesses. They are the sole judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. It is not the province of this court to substitute its judgment for that of the jury, unless we can say that the verdict is against the manifest weight of the evidence. (Mokrzycki v. Olson Rug Co., 28 Ill. App. 2d 117, 123 (1960).) There was support in the evidence for the verdict, and we conclude that it was not against the mani-

fest weight of the evidence. Rysdon v. Wice, 34 Ill. App.2d 290 (1962).

For the reasons stated, the judgment is affirmed.

AFFIRMED.

BURMAN and ENGLISH, JJ., concur.

Abstract only.

ABST.

(36 I.A.2 14)

PETER DANIGELES,
Plaintiff-Appellant,

vs.

SPIROS REGAS,
Defendant-Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE ENGLISH DELIVERED THE OPINION OF THE COURT.

This action was brought to recover $2,100, proceeds of a check which plaintiff alleged he gave to defendant by mistake. Defendant counterclaimed for $900 as the balance due on a $3,000 loan he had made to plaintiff and against which he had credited the $2,100 check. After trial without a jury, the court found against plaintiff on both claim and counterclaim, and entered judgment against him on the counterclaim for $900. Plaintiff appeals on the sole ground that the judgments are contrary to the manifest weight of the evidence.

The testimony for plaintiff (given chiefly by plaintiff and his son) was to the effect that the check in question was drawn on plaintiff's individual account through inadvertence; that it should have been drawn on a land trust account in which plaintiff, defendant (plaintiff's brother-in-law) and defendant's brother held the beneficial interest; that defendant had not made a $3,000 loan to plaintiff as alleged in the counterclaim.

The testimony for defendant (given chiefly by defendant and his brother) contradicted plaintiff's evidence throughout and supported the theory of defendant's counterclaim.

Each party testified to numerous collateral matters calculated to lend credence to his own claim and to cast doubt on the veracity of his adversary.

We consider it unnecessary to recite the testimony in detail. This case fits precisely into the rule which prevents us from disturbing the trial court's decision unless we determine that it is clearly contrary to the manifest weight of the evidence. We could not reach such a conclusion in this case without substituting our judgment for that of the trial court in assessing the credibility of the witnesses, and that we are not permitted to do.

This principle of law, controlling in the instant case, is so well settled as to require the citation of no authority. The judgments of the Municipal Court of Chicago are affirmed.

AFFIRMED.

MURPHY, P.J., and BURMAN, J., concur.

PUBLISH ABSTRACT ONLY.

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

(36 I.A.2 19)

At a term of the Appellate Court, begun and held at Ottawa, on Tuesday, the 6th day of February, in the year of our Lord one thousand nine hundred and sixty-two, within and for the Second District of Illinois:

SECOND DIVISION

Present -- Honorable JOHN F. SPIVEY, Presiding Justice
Honorable CLARENCE E. WRIGHT, Justice
Honorable DeWITT S. CROW, Justice
PAUL V. WUNDER, Clerk
RAY EUTSEY, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On MAY 1 1962 the same being one of the days of the term of Court aforesaid, the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

2nd DIVISION

Abstract

No. 11576 Publish Abstract Only Agenda 8

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

FEBRUARY TERM, A.D. 1962

IN THE MATTER OF THE PETITION OF HILLCREST CENTER, INC. AND HILLCREST SERVICE CORPORATION FOR DISCONNECTION OF CERTAIN TERRITORY FROM THE CITY OF CREST HILL, ILLINOIS.

HILLCREST CENTER, INC., an Illinois Corporation, and HILLCREST SERVICE CORPORATION, an Illinois Corporation,

Petitioners-Appellees,

vs.

CITY OF CREST HILL, ILLINOIS,

Respondent-Appellant.

Appeal from the County Court of Will County.

WRIGHT -- J.

The petitioners, Hillcrest Center Corporation and Hillcrest Service Corporation, brought this action in the County Court of Will County to detach certain territory from the respondent, City of Crest Hill, located in Will County,

Illinois. The County Court found the allegations of the petition to be true and ordered the territory described in the petition detached. From this order, respondent appeals.

Respondent contends that the court erred in finding that the territory sought to be disconnected is upon the border of the municipality; that the court erred in finding that the territory, if disconnected, would not result in isolation of part of the municipality from the remainder; that the court erred in finding that if disconnected, it would not be a territory wholly surrounded by one or more municipalities; that the court erred in finding that the petition was signed by a majority of the owners of record of land to be disconnected, and that the petitioners failed to sustain their burden of proof in compliance with the statutory requirements to entitle the territory to be detached.

Paragraph 7-39(a) of Chapter 24, Illinois Revised Statutes, (1959), provides that any territory may be disconnected from a municipality within one year from the municipality's organization if the territory sought to be disconnected is (1) Upon the border, but within the boundary of the municipality, (2) Contains twenty or more acres, (3) If disconnected, will not result in the isolation of any part of the municipality from the remainder of the municipality, and (4) If disconnected, will not be a territory wholly

bounded by one or more municipalities or wholly bounded by one or more municipalities and a river or lake.

The City of Crest Hill was incorporated January 22, 1960, under the Illinois Cities and Villages Act and the petition herein for detachment was filed on January 6, 1961, and the order of the County Court detaching the territory was entered on July 7, 1961.

The original southerly boundary of the City of Crest Hill insofar as it is pertinent to this case commenced at the intersection of the centerline of Larkin Avenue and the centerline of Theodore Street, thence ran westerly along the centerline of Theodore Street beyond the westerly boundary of the property described in the petition. The southerly limit of the property sought to be detached is identical with the original southerly limit of the City of Crest Hill. On September 16, 1960, the City of Crest Hill adopted an ordinance annexing to the city the southerly one-half of Theodore Street commencing at the centerline of Larkin Avenue running thence westerly beyond the westerly limits of the territory which the petitioners seek to disconnect from said municipality.

The validity of the ordinance, which was adopted on September 16, 1960, annexing the southerly one-half of Theodore Street to the City of Crest Hill, is herein questioned by the petitioners. This same question involving the identical

ordinance was raised and passed on by this court in Cox v. City of Crest Hill, 32 Ill. App. 2d 142, 177 N. E. 2d 247 (abstract opinion). In that case this court in holding the ordinance valid and in effect stated: "We are of the opinion that this ordinance of annexation passed on September 16, 1960 was not void, and that its validity could not be collaterally attacked in the present disconnection proceeding, and that for the present purpose and present proceeding it must be considered to be in effect."

For the reasons set forth in Cox v. City of Crest Hill, supra., we conclude that petitioners attack on the ordinance adopted by the City of Crest Hill on September 16, 1960, annexing the southerly half of Theodore Street commencing at the centerline of Larkin Avenue running thence westerly beyond the westerly limits of the territory sought to be detached to the city is without merit.

We next consider the question raised as to whether or not the territory described in the petition and sought to be detached is upon the border of the City of Crest Hill as required by statute. This question must be determined upon the state of facts as they existed at the time of the hearing and final disposition of the case. Cox v. City of Crest Hill, supra.

This question was before the court in Independent Amusements v. Village of Milan, 348 Ill. App. 258, 109 N. E. 2d

238. In that case, a proceeding was instituted to detach certain territory from the Village of Milan. It was stipulated that the south boundary of the Village of Milan is Andalusia Road, a regulation Illinois paved highway, and that the area sought to be detached is bounded on the south by this road, which runs easterly and westerly immediately adjacent to the south side of the area proposed to be detached, and that said area runs along that road for a distance of 854.6 feet. The court in that case in defining the word boundary within the meaning of the statute stated: "The diagram prepared by counsel for appellant and which is based upon the stipulation of the parties discloses that the entire southerly boundary of this substantially rectangular area sought to be detached and the south village limits of appellant are contiguous for a distance of 854.6 feet. The Century Dictionary and Encyclopedia defines the word border as a 'limit or boundary.' This area sought to be detached is unquestionably located on the southern border, boundary or village limits of appellant. If it is not so located it has not been suggested where it is."

In Independent Amusements v. Village of Milan, supra., the street in question was not a part of the defendant city but was owned and under the control of the State of Illinois as one of its regular state highways and a part of the highway system of the State of Illinois.

In the case now before us, it is clear from a diagram designated in the record as Petitioners' Exhibit No. 4 and admitted in evidence by stipulation of the parties hereto, that the south half of Theodore Street is the property of and under the complete control and jurisdiction of the City of Crest Hill.

The City of Crest Hill has jurisdiction over the south half of Theodore Street for the purpose of carrying out all of its functions and for the purpose of enforcing all of its ordinances. In fact, the south one-half of Theodore Street is just as much a part of the City of Crest Hill as any other area within the limits of the city.

The word border is defined as being a limit or boundary. Independent Amusements v. Village of Milan, supra,. The border or boundary of a city is a line which indicates and fixes a limit for the city or circumscribes or confines it.

The southerly limit, border or boundary of the City of Crest Hill is unquestionably the southerly line of Theodore Street. The southerly limit of the territory proposed to be detached is not located on the southerly line of Theodore Street, but on the contrary, is located on and runs along the centerline of Theodore Street for a distance of 1,020 feet. Since the southerly limit of the territory sought to be detached is located on the centerline of Theodore Street and

not upon the southerly line of Theodore Street, which we conclude to be the south limit, border or boundary of the City of Crest Hill, it is our opinion that the territory sought to be detached is not on the south border of the respondent municipality, within the meaning of Paragraph 7-39(a), Chapter 24, Illinois Revised Statutes, 1959, supra.

Petitioners' Exhibit No. 4, supra., shows that the length of the southerly border or limit of the area proposed to be detached is approximately 1,020 feet; the length of the westerly border or limit is approximately 863 feet; the length of the easterly border or limit is approximately 1,197 feet and the length of the northerly border or limit, which is irregular in shape, is approximately 1,449 feet.

The distance around the entire perimeter of the area proposed to be detached is approximately 4,529 feet and none of the perimeter of the area touches on the border of the City of Crest Hill except a small part in the southeast corner of the area, beginning at the centerline of Theodore Street and running north along the east line of Larkin Avenue for a distance of 248.71 feet.

Since only 248.71 feet of the entire area sought to be detached touches on the border of the city, we conclude that the area is not upon the border within the meaning of the statute. To hold otherwise would defeat the purpose and

intent of the statute and permit a little tail to wag a big dog. In re Village of Mount Prospect, Cook County, 341 Ill. App. 272, 93 N. E. 2d 578.

Where the point of a triangular piece of land proposed to be detached abuts on the city limits or where a very small or insignificant portion abuts upon the city limits as in the case before us, the whole area cannot be said to be located on the border. In re Village of Mount Prospect, Cook County, supra.

For the reasons herein stated, we hold that the territory proposed to be detached is not located on the border of the City of Crest Hill within the meaning of Paragraph 7-39(a) of Chapter 24, Illinois Revised Statutes, 1959, supra.

In view of our position on this point, it will not be necessary to consider the other points raised on this appeal.

The judgment of the County Court of Will County is reversed and the cause remanded for other and further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

SPIVEY, P. J. and CROW, J. Concur.

36 I.A.2 122

EILEEN AUERBACH,
Appellee,
v.
HERBERT AUERBACH,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Eileen Auerbach brought a suit against the defendant, Herbert Auerbach, in the Superior Court of Cook County seeking a divorce on the ground of cruelty. On December 28, 1960 the trial court entered a decree granting the plaintiff a divorce and in it provided that the defendant was to pay $30 per week alimony and $30 per week child support for their two minor children. The defendant appeals from this decree contending that the decree is against the manifest weight of the evidence and that the alimony and child support awards are excessive, and asks that the decree of divorce in favor of the plaintiff be reversed and that this court instruct the trial court to enter a divorce decree in favor of the defendant on his counterclaim.

The testimony of the plaintiff is that on Sunday morning, June 2, 1957, less than two weeks after she had given birth to a son, the defendant told her he was going to have breakfast and spend the day with a friend with whom he had spent four or five evenings of the previous week. She objected and an argument ensued. She threw her slipper at the defendant but did not hit him. He became violently angry and struck her with all his strength. He knocked her

down and he still kept on hitting her. The defendant denied striking her but admitted that there was a quarrel on that day. Defendant's counsel sought to show that a nurse was present in the home at the time of this alleged attack and that he had subpoenaed her to testify but that she had failed to appear. Counsel did not attempt to take the necessary action to compel her appearance.

The alleged second act of cruelty occurred on September 26, 1959. The plaintiff testified that as she entered the kitchen of their home she saw her husband holding her mother against the wall and striking her in an attempt to take the telephone away from the mother. The plaintiff had come in from the outside. It was raining and she had an umbrella with her. She struck the defendant with the umbrella. He took the umbrella away from her, struck her with it and hit her with his fist and threw her through the screen door of the kitchen, breaking the door. Her mother grabbed the defendant and came after him with a pot, which he took from the mother, and used it to beat the plaintiff over the head. On that day they separated and have been living separate and apart ever since.

A witness for the plaintiff, a neighbor, testified that the following day she noticed that the plaintiff had bruises on her forehead and her nose bulged out. She saw that the kitchen window in plaintiff's home was broken out and that the screen door was completely off its hinges.

The defendant testified that on that date he had a

quarrel with plaintiff's mother and had got into a fight with her; that his wife started to hit him over the head with an umbrella, which he took away from her; that plaintiff's mother tried to call the police; that in grabbing the umbrella from his wife's hands they struggled and he fell against the window and cut his hand; and that he did not strike his wife with his fist. He denies that any part of his wife's body went through the screen door, though he admits that the screen door was broken.

The plaintiff called a witness who testified that on a date prior to the alleged acts of cruelty the defendant had told her that he found that his wife was more acquiescent after he had "beat her up."

Defendant argues that the findings of the trial court are against the weight of the evidence.

The decree of the trial court should not be disturbed unless it is clearly and manifestly against the weight of the evidence. Long v. Long, 15 Ill. App.2d 276, 145 N.E.2d 509. In Balfour v. Balfour, 20 Ill. App.2d 590, 156 N.E.2d 629, the court reiterated the rule that the trial court is in a position to observe the witnesses while they are testifying and to make a determination as to their credibility and the weight of the evidence. We have before us nothing but a typewritten transcript of the testimony of the witnesses. From a careful reading of the evidence it is readily apparent that the court gave credence to the testimony of the plaintiff as against that of the defendant. Upon reading the record presented to us it is readily apparent that the trial court's

determination of the credibility of the witnesses was sound.

The defendant argues that since the plaintiff has failed to call her mother to corroborate what happened on September 26th the court must presume that the testimony of the mother would not support that of the plaintiff, and that since there was no other corroboration of the plaintiff's testimony the court should disregard it. The defendant did not deny that there was a violent altercation on that date and the window and screen door were broken. The argument of the defendant is that the wife, seeing the altercation between him and the mother, should not have intervened without first determining who was the original aggressor. We cannot believe that this contention is urged seriously. In Surratt v. Surratt, 12 Ill.2d 21, 145 N.E.2d 594, the court held that there was no rule requiring corroboration in a contested divorce case and that the only requirement is that the testimony be sufficiently credible in the light of opposing evidence to warrant acceptance by a reasonable person. See also Tuyls v. Tuyls, 21 Ill.2d 192, 171 N.E.2d 779, and Balfour v. Balfour, supra.

The findings of the trial court are not against the manifest weight of the evidence.

Defendant also urges that even though the court believed the plaintiff the acts of physical violence testified to are so slight that they do not constitute extreme and repeated cruelty. In Pantle v. Pantle, 19 Ill. App.2d 353, 153 N.E.2d 740, we said that each divorce case involving cruelty must be considered on its individual factual situation.

The argument that the two attacks upon the plaintiff by the defendant constituted slight acts of cruelty is so far fetched as to be untenable. The conduct of the defendant meets the requirements in Coolidge v. Coolidge, 4 Ill. App.2d 205, 124 N.E.2d 1, and in Balfour v. Balfour, supra. The plaintiff testified that on the last occasion the acts of the defendant caused her pain, suffering and bruises and that she went to a doctor on account of the condition of her nose, which she thought was broken. The doctor found that it was not. A corroborating witness testified that when she saw the plaintiff the next day her nose bulged out. The conduct of the defendant was such that it endangered the life and limb of the plaintiff and entailed great bodily harm. In Collinet v. Collinet, 31 Ill. App.2d 72, 175 N.E.2d 659, the court says:

> "No reference to slight acts of violence, great bodily harm, or danger to life and limb are found in our Supreme Court's most recent decisions interpreting 'extreme and repeated cruelty.' They state simply that the guilty party must on at least two separate occasions have committed acts of physical violence against his spouse resulting in pain and bodily harm, and that each case must be considered on its own facts.* * * [citing Tuyls v. Tuyls, supra]."

The defendant also argues that in both cases the plaintiff was the original aggresor. The rule with reference to assaults is that where there is an aggression the aggrieved party can only use reasonable force for the period of time when the danger exists. Prosser, Law of Torts, sec. 19 (2nd ed.). In the June 2nd incident the aggression was so slight it could be disregarded. On September 26th the plaintiff did nothing more than could normally be expected when she entered the house and saw the defendant hitting her mother on the face

and struggling with her for the telephone.

Finally, the defendant attacks the propriety of the alimony and child support awards. The matter had been referred to a master for determination. After hearing evidence he recommended that the defendant pay $75 per week for child support and alimony and he found that the defendant's income was between $6,000 and $7,000 per year from a family business. Another judge in the trial court had entered an order that the defendant pay $60 per week as temporary alimony and support money. In the decree for divorce the court found that the defendant was in arrears in the sum of $640 on the temporary order for alimony and support money. When we consider the fact that the defendant is working for a corporation owned by his family and that the master, after a complete hearing, found that the earnings of the defendant were between $6,000 and $7,000 a year it cannot be said that an allowance of $30 a week for alimony and $30 a week for support of their minor children is inequitable.

The trial court committed no error in entering the decree, nor in denying defendant's motion for a new trial and to modify the decree by reducing the amounts of alimony and child support. As the court said in Surratt v. Surratt, supra: "We conclude that the decree must stand, as to both the property provisions and the dissolution of the marriage. This court would not be justified in reversing a determination, which, as here, is dependent upon the weight and credence to be given the testimony of witnesses."

The decree of the Superior Court of Cook County is affirmed.

Affirmed.

Dempsey and Schwartz, JJ., concur.

48475

SIDNEY R. YATES, MARSHALL M. HOLLEB and RALPH R. MICKELSON,

Appellees,

v.

H. W. SHERMAN CORPORATION, formerly Sherman Wash Wear, Inc., a corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This appeal is taken from a summary judgment entered in the Municipal Court of Chicago on Count III of an amended statement of claim filed by the plaintiff. The statement of claim contained seven counts. Except for Count II, which was withdrawn, all the other counts are still pending in the trial court.

Section 50(2) of the Civil Practice Act (Ill. Rev. Stat. 1959, chap. 110, par. 50(2)) provides that where there are multiple claims for relief involved in one action the court may enter a final order, judgment or decree as to one but fewer than all of the claims only upon an express finding that there is no just reason for delaying enforcement or appeal, and that, in the absence of such finding, a judgment adjudicating fewer than all of the claims does not terminate the action and is not enforceable or appealable.

The judgment entered in the trial court did not comply with the requirements of the Act. In Johnson v. City of Rockford, 26 Ill. App.2d 133, 169 N.E.2d 534, the court entered a summary judgment in favor of one defendant in a

suit involving multiple defendants. The judgment entered by the court was final in form; however, the Appellate Court held that because of the failure to comply with section 50(2) of the Civil Practice Act by making an express finding that there is no just reason for delaying enforcement or appeal the appeal should be dismissed, citing Ariola v. Nigro, 13 Ill.2d 200, 148 N.E.2d 787. See also Peterson v. Gwin, 17 Ill.2d 261, 161 N.E.2d 123; Bohannon v. Ryerson and Sons, Inc., 15 Ill.2d 470, 155 N.E.2d 585; Cannon v. Thompson, 28 Ill. App. 2d 69, 170 N.E.2d 174; Brenner v. Neu, 26 Ill. App.2d 319, 168 N.E.2d 449; Henson v. Renshaw, 25 Ill. App.2d 178, 166 N.E.2d 166.

On oral argument this court raised this point and informed counsel for appellant and appellees that the appeal must be dismissed unless they could show the court ground for not taking such action. This they are unable to do. The appeal from the summary judgment of the Municipal Court of Chicago entered on Count III of the amended statement of claim in favor of the plaintiffs and against the defendant is dismissed.

Appeal dismissed.

Dempsey and Schwartz, JJ., concur.

48703

ALTER & ASSOCIATES, INC., Appellant, v. JOSEPH ZYLVITIS and JEANNE L. ZYLVITIS, Appellees.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order vacating its judgment entered by confession. The principal question urged by plaintiff is whether defendants were diligent in presenting their motion to vacate or open the judgment.

By a written contract dated June 11, 1960, plaintiff agreed to build a house on defendants' vacant lot. The contract contained a power to confess judgment if "purchaser" defaulted, and provided that "at seller's option, the purchaser shall pay the seller herein, ten (10%) per cent of the total contract price as liquidated damages and not as penalty."

On April 17, 1961, judgment for plaintiff was entered against defendants for $2,130. On June 1, 1961, an execution was served on both defendants. On October 24, 1961, the return day of citation proceedings, defendants presented their motion to vacate or open the judgment, with supporting affidavits. Although granted leave so to do, plaintiff did not file a counteraffidavit.

After a hearing on the motion, which consisted of an examination of defendants' supporting affidavits and the arguments of counsel, the court entered an order vacating the

judgment and granting leave to plaintiff to file an amended complaint, with leave to defendants to answer. It is from this order plaintiff has appealed.

Plaintiff contends that the court committed error, as a matter of law, because defendants failed to allege due diligence in their affidavits or to present evidence at the hearing of the motion showing diligence in presenting their motion to vacate or open the judgment.

As argued by plaintiff, a motion to open or vacate a judgment by confession should be made at the earliest opportunity, since diligence in presenting such a motion is expressly required by Rule 23 of the Supreme Court, adopted in 1955, which regulates the practice on motions to open up a judgment by confession.

Defendants' affidavits show that plaintiff never commenced the construction of the house and refused to do so, although the construction loan was approved; that defendants were not represented by counsel when the contract was signed, and they did not understand the nature and effect of a judgment by confession; that they consulted with an attorney regarding the citation proceedings returnable October 24, 1961, and at that time they were apprised of the nature and effect of such a judgment, and that they then advised their attorney to proceed with the motion to vacate the judgment.

Defendants contend they made a showing of diligence, but also argue that the judgment is void for a number of reasons, which include: (1) It was confessed for a sum in excess of the amount authorized by the power, and this was a departure from the

authority conferred; (2) that the judgment was confessed against Zyluitis instead of Zylvitis; (3) that the contract provided for a "penalty" as distinguished from liquidated damages; and (4) that where the warrant of attorney for the confession is to be exercised on a certain contingency, it must appear from the record that the contingency has occurred. No discussion of the authorities cited to support this contention is required, as we are not persuaded that the instant judgment is void.

The power to open or vacate a judgment by confession is an equitable one to be governed by the same principles (23 I.L.P., Judgments, §191, p. 278). It is necessary to justice that courts of law should liberally exercise that power. When a meritorious defense is shown, as here, the court has a liberal discretion in considering a motion to vacate a judgment by confession and to permit a trial upon the merits. It is the general rule that the question of a meritorious defense is of much more importance than the question of defendants' diligence or lack of it. Kolmar, Inc. v. Moore, 323 Ill. App. 323, 327 (1944); Stranak v. Tomasovic, 309 Ill. App. 177, 181 (1941).

At the hearing on the motion, plaintiff did argue the lack of diligence by defendants in presenting the motion to open or vacate. The remarks of the court show that the court gave "much more importance" to the question of a meritorious defense than to the question of defendants' diligence. It is apparent that the court considered the meritorious defense question to be paramount.

There is no showing in the record, and it is not argued, that plaintiff suffered injury in any way by defendants' delay in presenting the motion.

Although the record indicates a minimal exercise of diligence by defendants in presenting their motion, we find no abuse of the "liberal discretion" of the trial court in concluding the defendants were sufficiently diligent in presenting their motion to open or vacate the judgment.

We note, although it is not raised or argued by plaintiff, that the court vacated the judgment instead of opening it in accordance with the directions of Supreme Court Rule 23. An examination of authorities indicates that the terms "vacate" or "open" a judgment have been used synonymously and, in discussions, have been considered in the light of being analogous. Sternberger v. Wright, 239 Ill. App. 490, 492 (1926).

While the trial judge did not give his reasons for vacating the judgment instead of opening it, the order granting leave to plaintiff to file an amended complaint could have been intended as a measure to permit plaintiff to file a pleading which could correct the name of the defendants and the other points argued by defendant. We see no prejudice to plaintiff in "vacating" as against "opening" this judgment.

For the reasons given, the order appealed from is affirmed, and the cause is remanded with directions to proceed in accordance with the order and to a determination of plaintiff's action on its merits.

ORDER AFFIRMED AND CAUSE REMANDED WITH DIRECTIONS.

BURMAN, P.J., and ENGLISH, J., concur.

Abstract only.

Abstract

NO. 11601 Abstract only Agenda 13

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
FEBRUARY TERM, A. D. 1962

1st DIVISION

(36 I.A.2 254)

VIOLET R. VAN BURKOM, suing in the name of WILLARD VAN BURKOM,

Plaintiff-Appellee,

vs.

AL HOLQUIST, Defendant, BENNIE MILLER, Defendant-Appellant, and JOHN DOE and RICHARD ROE, Defendants,

Defendants-Appellants.

Appeal from the Circuit Court, DuPage County.

McNEAL, J.: -

In her complaint filed under the Dram Shop Act (Sec. 135, Ch. 43, Ill. Rev. Stat., 1959) plaintiff alleged that her son became intoxicated at two taverns, that as a result of his condition he had an automobile accident on June 16, 1960, which blinded and otherwise permanently disabled him, causing plaintiff to be injured in her means of support. She named the owners and operators of the two taverns as defendants, and alleged that one of the operators was named Bennie Miller and that he operated a tavern located at the corner of Highway 59 and Irving Park Road, DuPage County, Illinois. Summons was issued on June 8, 1956, against the defendants, including "Bennie Miller, c/o Bennie Miller's Tavern, Highway 59 and Irving Park Road, DuPage County, Illinois", and the return thereon shows personal service on Bennie Miller in Cook County, Illinois, on June 9, 1961.

On July 6, 1961, following the expiration of the statutory one year limitation for bringing an action under the Dram Shop Act, one Bernard J. Meller entered a special appearance supported by affidavit setting forth that his legal name was Bernard J. Meller, that he never used the name Bennie Miller, that he knew of no such person, and that he

was then engaged in a business enterprise in Cook County, but was not so engaged in DuPage County on June 16, 1960. He asked that the summons be quashed and that the suit be dismissed for lack of jurisdiction over his person. The Circuit Court of DuPage County ordered that the relief prayed for be denied, that the special appearance stand as the general appearance of Bennie Miller, and that said defendant be granted leave to answer or otherwise plead within thirty days. This appeal followed.

Miller or Meller followed the procedure set forth in section 20 of the Civil Practice Act. He relies principally upon In re Estate of Oelerich, 31 Ill. App. 457, in which the court held that the Probate Court of Cook County had no jurisdiction over an alleged incompetent resident of Indiana. Although the Oelerich decision supports appellant's contention that the order entered against him was appealable, the problem presented in that case is distinguishable from that presented here.

In the instant case the complaint is directed against the operator of a tavern located at the intersection of Highway 59 and Irving Park Road. The operator was sued under the name of, and personal service was had upon, Bennie Miller. Bernard J. Meller entered a special appearance supported by affidavit and alleged that his name was not Bennie Miller, but he did not deny that he did in fact actually operate the tavern located at the intersection of Highway 59 and Irving Park Road. In other words he did not deny but that he was the person intended to be sued and consequently the pleadings indicate that this is a case of misnomer rather than mistaken identity. Misnomer of a party is not a ground for dismissal but the name of any party may be corrected at any time before or after judgment, on motion, upon any terms and proof that the court requires. Section 21 (3) Civil Practice Act.

In Janove v. Bacon, 6 Ill. 2d 245, 250, a corporation was sued under an incorrect name, but service was had upon an agent of the corporation intended to be sued. The Supreme Court said:

"It is, of course, true that a person who is not served need not appear in an action. But where a summons is served upon him personally, and the circumstances are such as to indicate that he is the person intended to be sued, then he is subject to the judgment, even though the process and the judgment do not refer to him by his correct name."

In People v. Cottine, 20 Ill. App. 2d 562, 570, foreclosure was brought against Monahan Cartage Company rather than Monahan Trucking, Inc. The Court said:

"The effect of a misnomer upon the rights of a party named incorrectly was considered in the early case of Pond v. Ennis, 69 Ill. 341. The court there pointed out that the only issue was whether the real party in interest was actually served."

For the foregoing reasons it is our conclusion that the order of the Circuit Court of DuPage County was correct and should be affirmed.

Order affirmed.

DOVE, P.J., and SMITH, J., concur.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

May Term, A.D. 1962

IN THE MATTER OF THE ESTATE OF WILLIAM KAIFER, DECEASED	Appeal from the County Court of Marshall County, Illinois

DOVE, P.J.

William Kaifer, a resident of Marshall County, died testate on March 20, 1959. His will was admitted to probate and Dorothy June Shearer was appointed and qualified as executor and administered his estate. On August 29, 1960 the executor filed her final report which was set for hearing for September 12, 1960. Due notice of the filing of the report and the time and place of hearing thereon was given all of the heirs, legatees and devisees and upon the hearing on September 12, 1960 the final account and report of the executor was duly approved and the executor discharged.

On November 6, 1961 Ivan Kaifer, a nephew of decedent and a devisee, filed in the probate court his petition praying for an order setting aside and vacating the order approving the final report of the executor and setting aside the order fixing the Inheritance Tax assessed against him. In this petition he averred that he had paid the Inheritance Tax personally but that it should have been paid out of the residuary estate

of the testator, William Kaifer. The executor, Dorothy June Shearer, and all the legatees filed a motion to strike this petition. On January 8, 1962 a hearing was had resulting in an order granting the motion of the respondents to strike the petition and from a final order dismissing the petition, the petitioner, Ivan Kaifer, prosecutes this appeal.

The record shows that on November 4, 1952 William Kaifer, executed his will by the provisions of which he directed that his just debts and funeral expenses be paid out of his estate and that it was his will that all his real estate should pass to the devisees free from any and every encumbrance. He devised his town house, located in the Village of Henry, to Dorothy June Shearer, his niece, together with all household goods and furniture. By the fourth clause of his will he devised his farm of 240 acres to his nephew, Ivan Kaifer, the appellant herein, and by the residuary clause he bequeathed all the rest of his property to Nancy Joann Shearer and Martha June Shearer, his nieces.

The record further discloses that on October 9, 1959, an order was entered by the County Court of Marshall County, in probate, assessing the Inheritance Tax in this estate. The order recited that due notice was given to all parties in interest and found the total value of the estate to be $130,366.50. This order found the market value of the real estate devised appellant was $106,800.00, that his exemption amounted to $500.00, and assessed his tax at $9556.00.

The final account of the executor which was filed on August 29, 1960 recited, among other things, that all the debts and claims against the estate had been paid; that the executor had distributed all real estate of which the testator died seized, and also the personal property, according to the provisions of the will; that the Federal Estate Tax in the amount of $16,702.88 had been paid in full and that the Illinois Inheritance Tax due and owing pursuant to the order previously entered, including the sum of $9556.00 assessed against Ivan Kaifer, had been paid.

The instant petition alleged that there were more than enough assets in the residuary estate of William Kaifer, deceased, with which to pay all debts, court costs, attorney's and executor's fees, estate tax and all of the inheritance tax due the State of Illinois; that the attorney for the executor, however, informed petitioner that the inheritance tax due the State of Illinois upon the lands devised to him was $9556.00 and that it was his obligation to pay the same; that petitioner questioned his legal obligation to pay this tax but relying upon the advice of said attorney for the executor he paid the same on August 1, 1960.

The prayer of the petition was that the order approving the final report of the executor be set aside; that the Inheritance Tax order be vacated; that petitioner be granted permission to file objections to the tax return and on that hearing, an order be entered exonerating the land devised to petitioner from the lien of said tax and exonerating petitioner from the obligation to pay the same or any part thereof.

Counsel for appellant state that the only question involved in this appeal is whether appellant, or the residuary estate of decedent was legally obligated to pay the inheritance tax. Counsel say: "We do not know that the order of assessment is legally correct, we seek only a determination of whether it is legally correct". Counsel then state that the tax was assessed at the direction of the attorney for the executor and insist that under those circumstances "equity ought to allow the assessment order opened so that a legal determination could be made of the inheritance tax liability as distinguished from the order perfunctorily entered through the employment of inequitable conduct against appellant".

Counsel recognize that the law is that where an account of an executor is approved, on notice and hearing that it is binding on all persons to whom notice is given, except where fraud, accident or mistake has occurred.

Counsel concede that notice was given appellant of the hearing to assess the inheritance tax and also the hearing upon the executor's final report. What counsel overlook is that there has been a legal determination of the tax liability of appellant; that the record does not disclose that any order was perfunctorily entered and that there is no showing of fraud, accident or mistake as those terms are legally defined. Counsel say that three mistakes were made in the administration of this estate. First, appellant was mistaken when he relied upon a statement made by counsel for the executor that the payment of the inheritance tax was his obligation; second, that he, appellant made a mistake when he paid this inheritance tax, and third, that the attorney for the executor made a mistake when he did not have the question of appellant's liability for this tax determined by a suit to construe the will of William Kaifer. These are not the character of mistakes which would warrant the relief sought in this case.

The Probate Court Act provides: "Notice of the hearing of any account of an executor or administrator shall be given as the court directs to unpaid creditors and to every person entitled to a share of the estate who has not received that share in full. If the account is approved by the court upon the hearing, in the absence of fraud, accident or mistake, the account as approved is binding upon all persons to whom the notice was given". (Ill. Rev. St. 1961, Chap. 3, sec. 290).

The record shows that appellant was represented by counsel of his own choosing. He was furnished with a copy of the will shortly after the death of decedent. He had notice of the hearing to assess the inheritance tax and knew of the order entered, accepted the determination by the court and voluntarily paid the amount and furnished the executor of the estate the receipt of the County Treasurer evidencing its payment.

He was notified that a hearing would be had upon the final report of the executor but filed no objections or exceptions to the report and stood by knowing that the assets of the estate were distributed to the legatees and that the probate court approved that distribution.

Counsel for appellant, in support of his contention, cite Stade vs. Stade, 315 Ill. App. 136 which was a proceeding in equity by William Stade, administrator of the estate of George Stade, to vacate a judgment. It appeared that in the course of the administration of the estate of George Stade, land of the decedent had been sold to pay the claims against the estate and at the sale the land brought $9040.00 which was $620.29 in excess of the debts and liens against the land. This was the sum received by the administrator but his report of sale indicated that the land was sold for $9040.00 and that that amount had come into the hands of the administrator. In the final report of the administrator, however, the administrator corrected this apparent error and charged himself with the amount which he had actually received, being $620.29. An heir and certain creditors of deceased filed objections to the final report which were overruled and the objectors appealed to the circuit court where a default judgment was rendered against the administrator, for the full sale price of the land as represented by the report of sale. After thirty days had elapsed, counsel for the objectors wrote the administrator demanding payment of the judgment. The proceeding by the administrator to vacate the default judgment resulted in a decree granting the administrator the relief prayed and restrained the heir and judgment creditors from taking any step to enforce their judgment. In affirming that decree this court said that the record disclosed that the hearing of the appeal from the probate court was had without notice to the administrator or his attorney and that the first notice they had of the action of the court was the letter sent to the administrator demanding payment of the judgment, which was sent thirty days after the rendition of the judgment. The

court went on to say that where an administrator, by accident or mistake, is charged in his report with too much or too little, a court is authorized to ascertain the true facts and correct the report as the facts may justify, and charge the administrator only with the amount he justly owes, and that concealment of facts which have induced a court to enter a judgment, which it otherwise would not have rendered, are proper grounds for equitable relief and that a court of equity will grant relief against a judgment which is against conscience, or the justice of which can be impeached by facts, or where it appears that a party, because of fraud, accident, mistake, or by the act of the opposing party, was prevented from availing himself of his defense.

In Gahan vs. Golden, 330 Ill. 624, also cited by appellant, the court said (p. 636) that the County Court, in the exercise of its equitable jurisdiction, undoubtedly has jurisdiction, at a subsequent term, to set aside an order discharging an executrix and to enter an order allowing and directing a widow's award to be paid where the same was not previously done by reason of fraud, accident or mistake.

Bayne vs. Cinak, 320 Ill. 23, also cited by appellant, was an appeal from a decree granting specific performance. What the court there held was that where there are circumstances of misrepresentation, misapprehension or mistake which would make the enforcement of the contract offensive or unjust, it will not be enforced. The court, in the course of its opinion cited and quoted at length from Pomeroy's Equity Jurisprudence to the effect that a mistake of law, pure and simple, is not ground for relief, but where the ignorance or misapprehension of a party concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided or accompanied by inequitable conduct, equitable relief will be granted.

Sands vs. Sands, 112 Ill. 225, also relied upon by appellant, was a suit brought by a son against his mother seeking to compel her to re-execute a deed to a forty acre tract of land which she had previously conveyed to her son. It appeared that the deed was executed without consideration and at a time when the mother was ill. After its execution, the mother obtained possession of the deed and destroyed it. The mother's testimony was that her son and also the notary who took the acknowledgment, told her, at the time she signed the deed, that it would be worthless if she got well; that it could not take effect until recorded and that it would not be recorded while she lived. She further testified that the deed was never intended to take effect as a deed but it was delivered to the son with the request that he place it among his mother's other papers. The court, in sustaining the mother's contention, held that, under the evidence, the deed did not take effect and that it might be destroyed at the pleasure of the mother. In the course of its opinion the Supreme Court stated that ordinarily a court of equity will not relieve against a mistake of law but that where such a mistake is induced by a party taking advantage of it and where the relations of the parties are such that the party deceived is dependent upon the party deceiving, or under his influence, a court of equity will protect against any advantage thus obtained.

Counsel for appellee agree that these cases enunciate correct principles of law. Of course the County Court of Marshall County had jurisdiction to vacate its previous order which approved the final report of the executor, had that order been entered by reason of fraud, accident or mistake as those terms are interpreted by the authorities. The facts in the instant case are not analogous to the facts disclosed by the records in the cases relied upon by appellant. In the instant case it is not insisted that there was any fraud or misconduct by anyone or that appellant was induced by anyone to pay the tax which appellant now insists the testator intended should be paid by the residuary estate.

The record shows that after having the advice of his own counsel appellant, familiar with all the provisions of the will of decedent and not being mislead or induced in anyway by anyone voluntarily paid the amount of taxes which he now says were paid by mistake.

In Lewis vs. Westside Trust and Savings Bank, 376 Ill. 24, it is said (p. 45) that the plain intent of section 112 of the Administration Act is to discharge an administrator or executor at the completion of his duties, and where proper notice is given, an order of discharge is binding on heirs, devisees and creditors in the absence of fraud, accident or mistake. This record discloses no fraud, accident or mistake which would authorize the probate court to grant appellant the relief he seeks.

We find no merit in this appeal. The cost of the additional abstract furnished by appellee will be taxed against appellant. The order of the County Court of Marshall County is affirmed.

Judgment affirmed.

McNEAL, J. CONCURS.

SMITH, J. CONCURS.

48737

HIGHWAY REALTY CO.,

Appellant,

v.

EUGENE LEON BLAKE and JOHANNAH BLAKE,

Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Plaintiff, Highway Realty Co., appeals from an order opening its judgment entered by confession and from a judgment in favor of defendants, entered after an ex parte trial on the merits. The principal questions are whether defendants were diligent in presenting their motion to open the judgment, and whether the court was presented with any evidence to support the judgment for defendants.

By a written contract dated January 20, 1958, defendants, as "buyers," agreed to purchase from Donald R. Ruis and Elizabeth M. Ruis, his wife, as "sellers," an improved parcel of real estate. The purchase price was $13,700.10 to be paid by monthly instalments of principal and interest. By an assignment dated January 17, 1961, showing $3,674.84 remaining due and unpaid, the "sellers" transferred their interest in the contract to plaintiff, Highway Realty Co.

On May 24, 1961, pursuant to a warrant of attorney contained in the contract, judgment for plaintiff was entered against defendants for $4,487.67, which included interest and attorney's fees.

On June 22, 1961, execution was served on defendants. On September 7, 1961, the return day of citation proceedings,

defendants presented their motion to open the judgment, with a supporting affidavit. Plaintiff was given leave to file a counteraffidavit, and the matter was set for hearing on October 13, 1961. Subsequently, on December 15, 1961, at a hearing in which the court considered an amended motion, supporting affidavits, and exhibits of defendants, a counter-motion and affidavit of plaintiff, and the arguments of counsel, the court entered an order opening the judgment and setting the matter for trial instanter. At that point, counsel for plaintiff stated, "I would like the record to show that counsel for plaintiff is taking no part in the proceedings and is absent on the presentation of the evidence."

The court then, in an ex parte trial, directed, "The record may be received in evidence to show the payment of this note on which judgment was confessed," and pronounced judgment for defendants.

Defendants' affidavits show that on June 22, 1961, defendants' attorney called plaintiff's attorney, informed him that defendants "had paid all their obligations to Mr. Donald Ruis," and asked for a "photocopy of the document he had confessed judgment on," which plaintiff's attorney agreed to send; that although this promise was subsequently repeated, the document was never sent; and that in 1958 full payment of the purchase price of $13,700.00 was made by defendants, as "buyers," to Donald R. and Elizabeth M. Ruis, as "sellers," by the use of proceeds of a mortgage loan and direct payment of the balance.

Attached to the affidavit of defendants are photostatic copies of two documents: (1) a "loan statement" dated June 20, 1958, prepared by a loan association, showing disbursement of $10,035.16 "to Seller for Deed," being the net proceeds of a $10,300 mortgage loan, and (2) a letter dated June 19, 1958, addressed to the loan association, signed by Donald R. Ruis, stating, "The contract is paid down to $10,300.00 from the original price of $13,710.00," and that he had received $280.44 "from Eugene Blake for closing."

An affidavit filed on behalf of plaintiff verifies the telephonic communication between the attorneys on June 22, 1961, and further says, "Affiant stated to said attorney for defendants that if the fact was that the indebtedness had been paid, defendants should proceed to file a petition to set aside the judgment and also to be permitted to submit their defense."

Plaintiff vigorously contends that the court abused its discretion in opening and setting aside the judgment by confession, because the defendants failed to show due diligence in petitioning for such relief, as required by Rule 23 of the Supreme Court, which regulates the practice on motions to open up a judgment by confession. There is no showing in the record, and it is not argued, that plaintiff suffered injury in any way by defendants' delay in presenting the motion.

The power to open or vacate a judgment by confession is an equitable one to be governed by equitable principles (23 I.L.P., Judgments, §191, p. 278). It is necessary to justice that courts of law should liberally exercise that power. When

a meritorious defense is shown, as here, the court has a liberal discretion in considering a motion to open a judgment by confession and to permit a trial upon the merits. It is the general rule that the question of a meritorious defense is of much more importance than the question of defendants' diligence or lack of it. Kolmar, Inc. v. Moore, 323 Ill. App. 323, 327 (1944); Stranak v. Tomasovic, 309 Ill. App. 177, 181 (1941).

We find no abuse of the liberal discretion of the trial court in concluding the defendants were sufficiently diligent in presenting their motion to open the judgment. The remarks of the court, "If, in fact, the note had been paid in full upon which you confessed judgment, it would be inequitable to permit a judgment by confession to stand, even though they might have been slightly negligent in coming in two months after they had notice * * *," indicate that the court considered the meritorious defense question to be paramount.

Plaintiff further contends that no evidence was introduced by defendants to establish the defense of payment.

In an ex parte trial, and under the circumstances presented in this case, it was not an abuse of sound discretion for the trial court to receive in evidence photostatic copies of the documents in question and, in the absence of any rebutting evidence, to accept these documents as adequate proof of the payment in full of defendants' contractual obligations. 32 C.J.S., §624.

We agree with the trial court, "It would be unconscionable to let a judgment be entered in a case where the note had been paid and the maker of the note through inadvertence or some other reason failed to pick it up."

For the reasons given, the judgment for the defendants is affirmed.

AFFIRMED.

ENGLISH, J., concurs.

BURMAN, P.J., took no part.

Abstract only.

General No. 11605 Abstract Agenda No. 2

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

May Tern, A.D. 1962

(36 I.A.2 317)

S.C. NUDELMAN, Plaintiff-Appellee,	)	Appeal from the
vs.	)	Circuit Court of
RIVERVIEW HOME BUILDERS, INC. Defendant-Appellant.	)	McHenry County.

DOVE,P.J.

S.C. Nudelman, filed this action in the circuit court of McHenry County to recover real estate commissions which he alleged were due him on account of certain sales made by him of residences to be constructed by the defendant in a subdivision referred to in this record as Holiday Hills. A jury trial resulted in a verdict in favor of the plaintiff for $5075.25 upon which judgment was rendered. After overruling defendant's post trial motion this appeal followed.

Plaintiff's complaint, as amended, consisted of three counts. In count one he alleged that he was a licensed real estate broker and that between May 1, 1958 and May 2, 1959, the defendant employed him to procure purchasers for certain parcels of real estate located in Holiday Hills at certain specified prices and that the defendant agreed to pay him a commission of five per cent of the sales price, of the property so sold by him, as compensation for his services in procuring the purchasers. This count then averred that plaintiff procured

purchasers who were able, ready and willing to consumate their purchases as follows, viz:

John Van Duyn on October 27, 1958, for Lot 3, Block 10, Lot B, at a price of $16,930.00.
William and Faye L. Johnson, on December 23, 1958, for Lot 8, Block 6, Lot B, at a price of $15,710.00.
Kenneth and Carol Carlson, on January 31, 1959, for Lot 9, Block 14, at a price of $18,615.00.
John and Marjorie Connell, on November 23, 1958, for Lot 11, Block 17, at a price of $17,240.00.
Brian and Nancy Adcock, on November 22, 1958, for Lot 1, Block 10, Lot B, at a price of $16,985.00.
James and Clara Spangler, on February 18, 1959, for Lot 9, Block 6, Lot b, at a price of $15,-550.00.
Walter and Margaret Kubicki, on September 5, 1958, for Lot 3, Block 1, Unit 4, at a price of $18,300.00.

Count one then alleged that plaintiff had performed all the acts and things required of him to be performed by his employment contract and that he had not been paid anything by the plaintiff. This count demanded judgment for $5596.50. Count two contained many of the allegations of Count one and also averred that each of the seven purchasers specified in Count one entered into a valid, enforcible contract with the defendant for the purchase of the parcel of real estate described in Count one. Count Three alleged that defendant orally employed plaintiff to solicit building contracts for the defendant for which he was to be paid a 5% commission of the sales price; that in pursuance of that contract plaintiff procured purchasers for the premises and at the prices set forth in Count one; that said purchasers entered into valid enforciable contracts with defendant for the purchase of these several properties and thereupon plaintiff's compensatinn, under his contract with defendant, became due and payable. Defendant answered and filed an affirmative defense and counterclaim.

By its answer defendant admitted its employment of the plaintiff and agreement to pay him a commission of 5% as compensation for his services in procuring purchasers of its parcels of real estate in Holiday Hills Subdivision, admitted plaintiff procured purchasers for the several residences to be constructed as alleged in the complaint but denied that purchasers were procured for the prices specified by the defendant or for the prices set forth in the complaint. The answer further denied that the sales were made upon the terms and conditions acceptable to the defendant or pursuant to its contract with the plaintiff.

In its affirmative defense defendant alleged "that it employed the services of the plaintiff in the solicitation of building contracts, together with proposals for financing said buildings, which proposed contracts and methods of financing were to be submitted by the plaintiff to the defendant for the acceptance and approval of the defendant; that plaintiff was authorized to submit building contracts on a basis wherein ten per cent of the total sale price of the combined real estate and building contract was to be paid in cash by the purchaser, and not more than ten per cent of said combined sale price was to be secured by pledges from the holder of the mortgage to be given by such proposed purchaser; that plaintiff collaborated with other employees of the defendant in submitting certain building contracts to the defendant, without disclosing to it that certain payments thereon, which purported to be in the form of cash, were, in fact, taken only in the form of promissory notes of the proposed contract purchasers".

He further testified that one of the uses that he made of the machine was the excavation of basements and that he could not use it in this endeavor successfully. He further testified that he attempted to dig two basements with the machine and that it broke down on each occasion.

In June, 1958, the defendant was involved in an automobile accident and apparently seriously injured. Representatives of the plaintiff called upon the defendant at the hospital at the request of the defendant. The defendant stated that his purpose for requesting them to come to the hospital was to negotiate with plaintiff to repossess the equipment. He further testified that after his automobile accident it was obvious that he could no longer work for some length of time and that he wanted the plaintiff to dispose of the equipment and credit his account.

The uncontradicted testimony of the plaintiff is to the effect that at the time the defendant signed the equipment lease on May 27, 1958, being some sixty days after he had took possession of the equipment and commenced to use it, he made no complaint that the equipment was not functioning properly. The lease before us stated in reference to warranties, the following:

> "E. Lessee agrees that each item of Equipment is of a size, design and capacity

Mr. Copel was called as a witness by the plaintiff and testified that he had known plaintiff prior to April, 1958 and that after he took over the management of Riverview Home Builders he employed plaintiff to work for the corporation. "I had", continued this witness, as abstracted, "a conversation with Mr. Nudelman on or about the end of April, 1958 and I asked him if he would be interested in joining me in the enterprise of selling houses. He said he would, provided a satisfactory commission arrangement could be worked out. We agreed that his compensation would be five per cent of all houses sold. Mr. Nudelman's primary job was to sell houses, but if he sold a lot he was entitled to a commission on the lot also. Mr. Nudelman asked me what kind of financing I had. I told him that we had an arrangement with Home Federal Savings and Loan Association of Chicago who had offered to finance the homes by advancing eighty per cent of the appraised price of the mortgage deal and they also agreed to work out a deal with us whereby they would advance as high as ninety per cent of the contract sale. I told him at that time that Mr. Melahn (the president of defendant) was very anxious to see houses constructed and sold and that he had told me that in cases where he felt that the man was able to pay what he obligated himself to pay, that it was not absolutely necessary to have a cash payment rendered. Mr. Nudelman was told that he should get, if at all possible, ten per cent cash down. Part of Mr. Nudelman's job was to secure written contracts with purchasers. We had a form which I furnished to Mr. Nudelman. After Mr. Nudelman had signed up a customer, he would bring the signed contract to me so I could look it over. The contract, of course, set forth the terms of

the sale and I would then accept it or refuse it. If I accepted the contract, I signed four copies. The contract was then submitted to the financing agency, in this case being Home Federal Savings and Loan, together with the questionaire that was taken by Mr. Nudelman setting forth the financial responsibility of the prospective buyer. It was then submitted to Home Federal Savings and Loan who eventually, at a loan meeting, decided if the contract was acceptable or not to Home Federal Savings and Loan. Nudelman had nothing to do with financing. He procured the signatures and that was it. Financing was my responsibility."

This witness then continued: "In November 1958, Mr. Nudelman was made an assistant secretary of the corporation. I left on November 21 for a trip to Europe. I had a discussion with Mr. Melahn (the president) and suggested that inasmuch as I was no longer available, being in France, and since Mr. Nudelman was living in Chicago, it would be a matter of convenience that Mr. Nudelman should be made an assistant secretary so he could bring in the contracts, collect monies and sign for them as I had done formerly. I left on November 21, 1958 and did not return to Algonquin until March 31, 1959". On cross examination this witness said: "Mr. Melahn repeatedly, in the course of his visits to the sub-division, stated, that if a man, in our opinion, was financially strong enough to make the down payment, it would be perfectly acceptable to take less than ten per cent down". And in response to the question: "Did he say how much less than ten per cent down you could take?" Replied: "I believe he said 'whatever you can get' ".

The record discloses that on November 28, 1958 all the members of the Board of Directors of defendant company were present at a director's meeting, the minutes of which recite: "The president reported that Mr. S.C. Nudelman had been employed by the corporation for sometime in processing the contracts and mortgage papers for the homes sold by the corporation. Mr. Melahn (the president) also stated that he felt it would be well for Mr. Nudelman to be an officer of the corporation because his normal duties would require him to act in that capacity. Upon motion by E.M. Melahn and seconded by Arnold Melahn, Mr. Nudelman was nominated for the office of assistant secretary of the corporation. Mr. Nudelman was thereupon unanimously elected to said office to serve until his successor should become qualified".

Mr. Copel testified that he had suggested to Mr. Melahn that it would be a matter of convenience to make Nudelman an assistant secretary "so he could bring in the contracts, collect moneys and sign for them as he, Copel, had done. To a question whether he had told Nudelman that he could sign a contract as a broker and also accept the terms of the same contract as an officer of defendant, his answer was: "No, I don't think it was ever said that way, no". Mr. Nudelman testified that at the time he became assistant secretary, Mr. Copel told him that he, Nudelman, did have authority to sign and also accept contracts on behalf of the company; that Mr. Melahn had said nothing about the amount of the down payment to be made by purchasers of homes but had said that he (Melahn) wanted more house sales and told him in that connection that "if a man had a good character and fairly decent earnings, to put him in a house".

Mr. Nudelman's evidence with reference to his employment by Mr. Copel, who was acting on behalf of the defendant, was in accord with the testimony of Mr. Copel. Mr. Nudelman further testified that he had nothing to do with the financial arrangements which the defendant had with Home Federal Savings and Loan Association in financing the construction of homes and that he, Nudelman, always followed Copel's directions in every particular.

Ralph Pahling, called as a witness on behalf of the plaintiff, testified that he was assistant vice-president of Home Federal Savings and Loan Association of Chicago and that his duties were to process mortgage applications and any instruments pertaining to the sale, purchase or making mortgage loans on contract. He produced seven instruments, each designated as a "Building Contract", and are referred to in the record as the Van Duyn, Johnson, Carlson, Connell, Adcock, Spangler and Kubicki contracts. The defendant is designated as "Builder", and the several purchasers, as "Owners". These contracts were offered in evidence by the plaintiff and received in evidence by stipulation of the parties. The Van Duyn contract, at the top of the instrument, was dated October 27, 1959 and was signed by John and Josephine Van Duyn, designated as "Owners". At the bottom the date is February 22, 1959 and following the printed word "Salesman" appears the name of S.C. Nudelman and under his name appears "accepted for the Riverview Home Builders Inc." by S.C. Nudelman". The Adcock contract is dated November 22, 1958; the Connell contract is dated November 23, 1958; the Johnson contract is dated December 23, 1958; the Carlson contract is dated January 31, 1959; the Spangler contract is dated February 18, 1959 and the Kubicki contract is dated September 5, 1958.

Each of these instruments describe premises in Holiday Hills Subdivision and obligate the defendant to furnish all labor and material necessary to construct a residence upon the described property according to plans and specifications attached to and made a part of the agreement. The agreement also obligates defendant to finance the unpaid balance of the specified purchase price over a period of years in specified monthly installments. Each contract contained these provisions: "This agreement shall not be binding on the builder unless accepted in writing by an officer of the Builder and when so accepted this contract and all the provisions thereof shall insure to and be binding upon the parties hereto and their respective heirs, executors, administrators and assigns. Owner understands that no agreement other than this, oral or written, is binding upon Builder unless accepted in writing by an officer of Builder".

Mr. Nudelman testified that the commission of 5% due him was based on the actual cost of the several homes; that his commission on the Van Duyn contract is $671.75; on the Johnson contract $673.25; on the Carlson contract $779.50; on the Connell contract $712.00; on the Spangler contract $664.00; on the Adcock contract $659.75 and on the Kubicki contract $915.00. These several amounts aggregate $5075.25 and is the amount the jury found was due the plaintiff from the defendant. In answer to a question, propounded by counsel for defendant, when Nudelman was testifying as an adverse witness, Mr. Nudelman stated that Mr. Copel had told him he could sign a contract as Salesman and also accept it for defendant. He was then asked: "I am asking you, Mr. Nudelman, did Mr. Copel himself personally tell you, Mr. Nudelman, you now have authority to accept contracts where you are a salesman for Riverview Home Builders?" Mr. Nudelman replied: "Yes, he did". And in reply to a further

question whether any one else in the organization ever told him he had that authority, Mr. Nudelman, replied that he was working for Mr. Copel and that he followed his instructions.

E.M. Melahn was the only witness, other than the plaintiff, who testified on behalf of the defendant. Mr. Melahn stated that he was President of defendant, had known Oscar Copel for twenty years, that Copel was employed by defendant to create a sales program to sell homes and vacant lots in Holiday Hills and that Copel was the general manager of defendant in Holiday Hills; that after Mr. Copel's employment as general manager, Mr. Nudelman was employed as a salesman and that he, Melahn told the plaintiff that he "would have to follow the policy which had been set forth earlier with Mr. Copel and I told him in no instance was there to be any sale of any home with less than ten per cent paid down on the home".

Mr. Melahn further testified: "Mr. Nudelman told me that he would sell the homes on the policy that I had set forth and that there would be certain pledges that he would be required to take in the financing of these homes; that these pledges were that portion of the purchase price of the home that was to be carried by Riverview Home Builders, in an account at the Savings and Loan Association. For every $150.00 that the buyer reduced the principal by, $100.00 would be paid to Riverview Home Builders. When it first became known that we were going to have to accept pledges to get financing I had a discussion with Mr. Nudelman concerning the value of these pledges. This was about July or August of 1958. I told Mr. Nudelman that I was not too happy with these pledges and he said he thought they

were as good as money in the bank". On cross-examination this witness testified that Mr. and Mrs. Connell, Mr. and Mrs. Carlson, Mr. and Mrs. Van Duyn were living in the property they purchased in Holiday Hills at the time of the trial, May 22, 1961 and that Mr. and Mrs. Kubicki had lived there several months.

In his pre-trial deposition, Mr. Melahn, in answer to the question: "Now, after Mr. Nudelman was employed by Mr. Copel did you ever have any conversation with Mr. Nudelman concerning his duties?" Answered: "No". In answer to another question: "Did you (Melahn) ever have any conversation with him concerning the extent of his authority as a broker?" Answered: "No". And to the question: "You had never told Mr. Nudelman about any limitation of his authority, is that right?" Mr. Melahn answered, "No". In answer to another question: "At the time Mr. Nudelman was employed as a broker and thereafter as assistant secretary, were you, at that time, actively associated in the operation of the business"? Mr. Melahn answered: "Only after he was appointed assistant secretary".

In rebuttal Mr. Nudelman and Mr. Copel both testified that Mr. Melahn never said in any conversation where Nudelman and Copel were both present that in no instance was there to be any sale made with less than ten per cent down.

Counsel for appellant state that its theory is that plaintiff's employment did not authorize him to act both as a salesman and to bind the company, of which he was assistant secretary, to contracts he procured without first submitting those contracts to other officers of the corporation. Counsel, continue: "It is defendant's theory that regardless of whether

or not the plaintiff had either actual or implied authority to accept contracts in the name of the corporation, after he had accepted those contracts, he had the duty of a fiduciary to disclose to the defendant corporation and to the financial institution which was providing the financing, that down payments, progress payments and final payments recited in the building contracts as being in cash, were, in fact, taken by the plaintiff in the form of promissory notes". Counsel insists that plaintiff was hired as a broker to obtain purchasers on terms acceptable to the defendant; that plaintiff deliberately misled the defendant, the finance company and the purchasers and that "even if he had proven that the corporation realized a benefit from any of these transactions, he would not be entitled to profit by his own morally questionable acts".

By its answer defendant admitted thatplaintiff procured purchasers for residences to be constructed as alleged in the complaint and that it entered into the contracts as set forth in the complaint. Whether plaintiff, as an officer of defendant, could accept these contracts for the defendant was not put in issue by the pleadings. The jury, by its verdict, must have found that plaintiff did, as an officer of the company, have that authority and the evidence warranted its conclusion.

By its answer, defendant denied that the several contracts set forth in the complaint were procured by the plaintiff upon terms and conditions acceptable to the defendant and within the terms of plaintiff's employment. These were questions of fact. The evidence is that plaintiff was employed by defendant to solicit building contracts; that he procured purchasers for certain described lots belonging to defendant upon

which houses were to be constructed by defendant on terms prescribed by defendant and that written contracts on forms furnished plaintiff by defendant, were executed by defendant and the several purchasers. Mr. Melahn, president of defendant, testified that he told plaintiff that in no instance was there to be a sale with less than ten per cent down payment but this evidence was at variance with his pre-trial deposition and with other evidence found in the record.

While defendant's answer and affirmative defense allege that it was plaintiff's duty to procure satisfactory financing, both, Mr. Copel and Mr. Nudelman testified that Nudelman had nothing to do with financing and there is no evidence to the contrary. The questions of fact presented by the pleadings have been resolved in favor of the plaintiff and the jury's findings are supported by the evidence.

It is insisted by appellant that the court erred in giving two instructions tendered by the plaintiff. Instruction No. 5 told the jury that when an employer denies that his agent had authority to make a particular contract, it is the employer's duty promptly to disavow his agent's act as soon as the employer receives knowledge thereof and if the employer does not do this, or if he does, and thereafter accepts the benefits of the unauthorized act the employer will be held to have accepted and ratified the agent's act and will be bound by it. The instruction then concluded: "And if in this case you believe from all the evidence that S.C. Nudelman made certain unauthorized building contracts on behalf of the Riverview Home Builders, Inc., and that the defendant received knowledge thereof and thereafter accepted the benefits of said contract, if any, then the defendant,

Riverview Home Builders, Inc., will be deemed to have accepted and ratified the said unauthorized building contracts, if any, and the defendant will be bound thereby".

Counsel states that the rule of law covered by this instruction is a familiar one and is applicable where the issue is between buyer and seller but in the instant record there is no evidence of ratification of any building contract by defendant nor any evidence that defendant received any benefits from any building contract. This record discloses that the property described in the Kubicki contract was improved by a house when the contract was executed; that after the execution of the contract, the purchasers, Mr. and Mrs. Kubicki, moved in and lived there for some months and thereafter left. The Van Duyns contract recites the payment by the purchaser of $225.00 at the date of the contract and the evidence indicates that the Van Duyn's owned the lot at the time the contract was signed. Mr. Nudelman also testified that he collected substantial money from the Van Duyn's and turned it into the office, and Mr. Melahn testified that the Van Duyn's were living in the house at the time of the trial. We believe the evidence warranted the giving of this instruction. It was approved in The Baldwin Co. vs. Paley, 161 Ill. App. 300, 301-2.

. . It is also insisted that there is no evidence to support instruction No. 7, given at the request of the plaintiff. This instruction reads: "The court instructs the jury that if you believe from the evidence in this case, that the defendant, Riverview Home Builders, Inc., a corporation, employed the plaintiff, S.C. Nudelman, as its agent, to negotiate the sale of its property or buildings and that the plaintiff undertook said employment and was instrumental in bringing together the buyer and the defendant, then and in that case, the plaintiff is entitled, as a matter of law, to recover from the defendant corporation, for his services, regardless of the fact that some other officer or agent of the

defendant concluded the sale, and upon a price less, and upon terms different from those at which the plaintiff was authorized to sell".

The evidence discloses that in addition to the Van Duyn contract, referred to in the complaint, which was in evidence, another contract executed by the Van Duyn's was admitted in evidence as defendant's exhibit No. 1. Both contracts described the same premises but, in defendant's exhibit the purchase price is $16,745.00, the down payment $200.00, and the monthly installment is $74.00, while in plaintiff's exhibit the purchase price is $16,930.00, the down payment $225.00, and the monthly installment, $82.00. The evidence also indicates that contracts other than the ones referred to in the record as the Johnson and Spangler contracts may have been executed by these parties. With this, and other, evidence in the record, it was not error to give this instruction. Counsel for appellant concedes that it correctly states the law. (Henry vs. Stewart, 185 Ill. 448, 452).

Instruction No. 1, tendered by defendant told the jury "that as a matter of law, the plaintiff cannot recover under the complaint in this case unless he has shown by a preponderance of all the evidence in the case a contract fully performed on his part."

Instruction No. 5, tendered by the defendant, is as follows:

> "An agent ought, as far as possible, to represent his principal, and, to the best of his ability, he should endeavor to successfully accomplish the object of his agency. It is the agent's duty to keep his principal fully and promptly informed of all the material facts or circumstances which come to his knowledge and, since he is expected to represent his principal, he cannot have a personal interest adverse to the interest of his principal, and if he deals with the subject matter of the agency, the profits will, as a general rule, belong to the principal, and not to the agent. In all things he is required to act in

entire good faith toward his principal. There are duties which the law imposes upon the agent without any express stipulations on the subject, and one of these duties of an agent is to keep his principal informed of his acts and to inform him within a reasonable time of sales made, and to give him a timely notice of all facts and circumstances which may render it necessary for the principal to take measures for reasons of security. An agent cannot act for his principal and for himself in the same transaction and if you find from the evidence in this case, that the plaintiff failed to make a full disclosure of all the facts involving contracts executed by him, then I instruct you that the plaintiff is not entitled to a broker's commission in connection with those contracts".

Defendant's tendered instruction No. 6, told the jury that when the plaintiff executed contracts as agent of the defendant corporation, and tendered them to the defendant as a broker, that then "regardless of whether or not he, the plaintiff, was authorized to execute those contracts by the corporation, he became a fiduciary of the corporation and in such a case, the burden is on the plaintiff to prove, by a preponderance of the evidence, that the transaction was entirely fair in every respect and that the gain which the plaintiff stood to enjoy as a broker had no influence on his acceptance of the contract in the name of the defendant."

Instruction No. 1 refers to the complaint but it, did not state what the complaint charged, nor did any other instruction. The instruction does not inform the jury the provisions of the contract to which the instruction refers, although it stated that the plaintiff must show a contract fully performed by him.

Instruction No. 5 states that the agent must inform his principal fully and promptly of all material facts and circumstances which have come to his knowledge but it leaves the jury to determine what those "material facts and circumstances" are. Many of the statements in this instruction are abstract

principles of the law of agency but have no application to the issues in this case. This instruction is confusing and argumentative.

Instruction No. 6 has many of the faults of instruction No. 5. It is inaccurate, argumentative and does not correctly state the law. The plaintiff was not obligated to prove by a preponderance of the evidence that his transaction was entirely fair in every respect or that "the gain which plaintiff stood to enjoy" had no influence on his acceptance of a contract in the name of the defendant. The trial court properly refused these instructions.

Defendant's post-trial motion states that the trial court erred in refusing to admit in evidence certain exhibits and erred in sustaining plaintiff's objections to offers of proof made by defendant. On cross-examination of the plaintiff, when he was called by defendant, as an adverse witness, counsel for defendant said: "I have in my hand here a number of checks all of which are dated prior to December 1, 1958 which I would like the reporter to mark in proper order as an offer of Proof, Exhibits 1,2,3,4,5,6,7,8,9,10 and 11, and I offer these checks in proof, that prior to December 1, 1958, the plaintiff received commission payments,----------these checks bear the indorsement of S. Charles Nudelman and show a cancellation at the bank. I offer to prove that each one of these checks was delivered to Mr. Nudelman prior to December 1, 1958". An objection was made by counsel for the plaintiff and the court inquired of counsel for defendant if there was anything more to the offer: Thereupon counsel for defendant stated: "I also offer to prove that some of the funds covered by these checks were for services rendered

by Mr. Nudelman which had to do with these mortgage processing duties and other duties than the five per cent commission". The objection of counsel for plaintiff was sustained and the offer of these exhibits in evidence was denied. The ruling was clearly right. What this offer amounted to was that eleven checks had been issued by defendant and delivered to plaintiff, prior to December 1, 1958. There is no evidence and it does not appear for what purpose these checks were issued or for what services, if any, plaintiff had rendered defendant in connection therewith. Counsel did state, in answer to the court's query, that some of the funds covered by the checks were for services rendered by plaintiff "which had to do with these mortgaging processing duties", but it was not shown which checks or what way, if any, any of these checks were related to the issues in this case. If they were, it was the obligation of counsel to identify the particular ones. In Romine vs. City of Watseka, 341 Ill. App. 370, 376 this court said: "The burden is not on the trial court to separate that part of the offered evidence which is admissable from that part of the offered evidence which is not admissable."

Upon the trial, during the cross-exaimnation of plaintiff as an adverse witness by counsel for defendant, plaintiff was asked whether he had seen and read certain credit reports, identified as defendant's exhibits No. 2,4,6,8,10,12,14 and 16. Plaintiff answered that after Mr. Copel had left, he, plaintiff, had read them but he never approved them. These reports were compiled by an independent commerical credit reporting agency. They were for the use and benefit of the financing agency, Home Federal Savings and Loan Association. It is not shown that plaintiff had anything to do with their preparation. He could not be bound by anything contained in these reports which were the work product of Hale-Prietsch Commercial Reporting Service.

The conclusions or statements of representatives of this service could not be binding on the plaintiff. The trial court properly sustained objections to these exhibits.

Counsel for defendant insists that the undisputed evidence found in this record requires that the verdict of the jury be set aside, the judgment thereon reversed, and judgment entered for the defendant. In order, however, for a reviewing court to determine that a verdict is against the manifest weight of the evidence, an opposite conclusion must be clearly evident or the jury's verdict palpably erroneous and wholly unwarranted. (Vasic vs. Chicago Transit Authority, 33 Ill. App. 2d 11, 180 N.E. 2d. 347.)

We have examined the record in this case, read the abstract thereof, considered the briefs and arguments of counsel and find no reversible error in this record. The judgment of the Circuit Court of McHenry County is therefore affirmed.

Judgment affirmed.

McNEAL J. CONCURS.

SMITH, J. CONCURS.

36 I.A. 320

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

February Term, A. D. 1962

Term No. 62-F-6 Agenda No. 9

THOMAS L. WATERS, Plaintiff-Appellant,	)	
vs.	)	Appeal from the Circuit Court of St. Clair County, Illinois.
ZENO MIDDLETON, Defendant-Appellee.	)	

CULBERTSON, J.

This is an appeal by plaintiff, THOMAS L. WATERS, an attorney, from an adverse judgment in a suit brought by him against the defendant, ZENO MIDDLETON, who is also an attorney. The case was tried by the Court, without a jury.

Plaintiff contended that he was entitled to share equally in a fee that defendant claims was entirely his. Plaintiff based his claim on an oral contract, the existence of which was denied by defendant. No contention is made that plaintiff can recover other than on his claimed oral contract. The evidence in this case was in sharp conflict and we have examined same with care.

It is contended on this appeal that the finding of the Court is against the manifest weight of the evidence, and that there was evidence fabricated by defendant. The Trial Court

hearing this case heard the evidence and the various contentions as made on the trial of this case and observed the demeanor of the witnesses, and his evaluation of the evidence resulted in a finding in favor of the defendant.

Our consideration of the evidence on this appeal brings us to the conclusion that it is sufficient to support the finding of the Trial Court, and in the absence of said finding being clearly and manifestly against the weight of the evidence we conclude that same should not be disturbed by us (KUEHNE vs. MALACH, 286 Ill. 120; SWIFT & CO. vs. DOLLAHAN, 2 Ill. App. 2d. 574; VIRGO vs. STATE FARM MUTUAL AUTO INS. CO., 12 Ill. App. 2d. 56). A judgment on conflicting evidence will not be disturbed on appeal (JONES vs. CHICAGO TRANSIT AUTHORITY, 23 Ill. App. 2d. 504).

The judgment of the Circuit Court of St. Clair County is hereby affirmed.

Judgment affirmed.

HOFFMAN, P. J., and SCHEINEMAN, J., concur.

PUBLISH ABST. ONLY

62-M-7

In the

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

Gladys Woodward, Adm. of Estate of Alfred B. Woodward, Deceased,	)	Appeal from
Plaintiff-Appellant,	)	the
-vs.-	)	Circuit Court
	)	of
Gale Spangler,	)	Marion County,
Defendant-Appellee.	)	Illinois

Hon. Daniel H. Dailey, Judge Presiding.

Scheineman, P. J.

This was a suit for wrongful death, which resulted in a verdict for defendant, upon which judgment was entered, and the plaintiff's post-trial motion was denied. On this appeal the plaintiff contends the court erred in giving the jury three instructions tendered by the defense. It is also contended the verdict is contrary to the manifest weight of the evidence.

The abstract filed by plaintiff does not comply with the Uniform Rules which require that it"present fully every error relied upon." There is a notation that there was a conference on instructions, but

the proceedings are not disclosed, and there is no showing as to what, if any, objections were made. Courts of review will not reverse on the basis of objections which were not made at the conference. Onderising v. E.J. & E. Ry., 20 Ill. App. 2d 73; Thompson v. C. & E.I.R.R., 32 Ill. App. 2d 397; Thomas v. Weber, 14 Ill. App. 2d 562; Greenlee v. John G. Shedd Aquarium, 31 Ill. App. 2d 402.

This abstract also sets out only the three instructions objected to. Error cannot be predicated upon the rulings of the court in giving or refusing instructions unless all of the instructions are set out in the abstract. Votrian v. Quick, 271 Ill. App. 259; Sykes v. Bontz, 18 Ill. App. 2d 129; Pantelen v. Gottschalk, 21 Ill. App. 2d 163; Okai v. United Roofing and Siding Co., 24 Ill. App. 2d 243. There are many others to the same effect.

The claim that the verdict was against the manifest weight of the evidence may possibly stem, in part, from the fact that the brief writer was working from plaintiff's abstract. It contains an understatement of some of the adverse testimony, and other errors, some serious. With the help of defendant's supplemental abstract, we find these facts:

The collision involved occurred on a dark, rainy evening in December. A stalled truck was parked on the highway, headed north, with another truck belonging to the same party in front of it, being in the process of hooking on for a tow. Defendant, also going north, overtook and passed a slower moving vehicle, got back on his side of the road, and then collided with the rear of the truck. Plaintiff's intestate was crushed between the trucks.

The driver of the overtaken vehicle testified that, when defendant went around him shortly before the collision, there were no red lights visible ahead, the road appeared to be clear, and it was straight and flat at that point. The fact there were no red lights visible was omitted from plaintiff's abstract. This witness

would say defendant was not going over 60 mph.

A passenger in this car confirmed that there were no lights visible on the rear of the truck. This car narrowly avoided a collision, but got around and then returned. The passenger walked around the stalled truck. When they drove past, witness looked back and saw the truck lights come on. Plaintiff's abstract has him also say that when they drove around the vehicles, there were flares in the road. Again, when he walked around the truck there were flares out. The official report shows in both places, he said there were no flares.

We find the verdict justified and well within the scope of the testimony. The judgment is affirmed.

Judgment Affirmed.

Culbertson and Hoffman, JJ., concur.

Publish Abstract Only.

Abstract

General No. 11623 Agenda No. 6

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT - FIRST DIVISION

May Term, A.D. 1962

36 I.A.2 350

GENEVIEVE JOSEPH, Administratix of the Estate of THERESA ANN JOSEPH, Deceased,	)	Appeal from the
Plaintiff-Appellant,	)	Circuit Court of
vs.	)	Peoria County.
WILLARD MAUERMAN and FRANCIS SHORT,	)	
Defendants-Appellees.	)	

DOVE, P.J.

This is an action seeking to recover damages for the alleged wrongful death of Theresa Ann Joseph who was struck and killed by an automobile owned by defendant, Francis Short and driven by the defendant Willard Mauerman. The trial resulted in a verdict and judgment in favor of the defendants and the record is before us for review upon the appeal of the plaintiff.

The record discloses that on December 14, 1955, decedent was twelve years of age and a student at St. Mark's Parochial School. On that day she and six of her schoolmates had had their noon lunch at the home of Sidney Cain, whose daughter, Sheila, was one of Theresa's classmates. About 12:45 o'clock p.m. the seven girls left the Cain home which is located on the south side of Moss Avenue in the City of Peoria and were on their way back to school which was located north and west of the Cain home. After leaving the

Cain home the girls proceeded north, crossing Moss Avenue in the middle of the block. Moss Avenue, at this point, is a level, straight, thirty foot wide, paved street, running in an easterly and westerly direction in a residential area. McArthur Avenue runs in a northerly and southerly direction and is the first street west of the Cain residence and intersects Moss Avenue approximately 200 feet west of the Cain residence. This intersection is protected by the customary electrically controlled, red and green stop and go, lights. Garfield Avenue is the first street east of McArthur Avenue, which runs in a northerly and southerly direction and it also intersects Moss Avenue and is east of the Cain residence.

The defendant, William Mauerman, at the time of the occurrence was a high school student, 16 years of age. He was employed part time at a filling station located at the corner of University and Western Avenues. At noon, on the day of the accident, Mr. Mauerman was at the filling station and at the request of Francis Short, whose car was at the Nichols Auto Electric Service Shop, undergoing repairs, Mauerman accompanied Short in another car to that repair shop. Upon arrival at this shop, Short and Mauerman waited some thirty minutes while Mr. Nichols completed some repairs to the Short car. This was the car which was later involved in this accident. Mr. Short left the repair shop in the car in which he and Mr. Mauerman had ridden from the filling station to the repair shop and Mr. Mauerman left in the car which had been undergoing repairs. No one was with him and after he had driven a few blocks he stopped at the Ace Auto Company and picked up an automobile part for his employer. As abstracted, Mr. Mauerman then testified: "I got back in my car, It was then not quite a quarter to 1:00 o'clock. From that point I travelled 20 blocks, about two miles, from the place where the Joseph girl was struck.

I drove up Harrison Street to 7th, down 7th and up Union Hill. The accident happened about 10 to 1:00. In that period of about 5 minutes, I travelled 20 blocks. There was one stop sign at Franklin and Jefferson. As I drove during those 20 blocks I did not notice anything unusual about my car. It's about one block from the bottom to the top of Union Hill".

This witness further testified that the car he was driving was an Oldsmobile 98 Rocket equipped with automatic transmission and efficient power brakes; that it had a powerful engine and was in good mechanical condition and that he did not notice anything unusual about the car until after he had crossed the Garfield Street intersection. He further testified that he was familiar with Moss Avenue, its traffic signals and knew that the Parochial School was in session the day of the accident.

This witness then continued: "I knew from my instruction at Central that the carburetor would only open as far as the gas feed went down. I went up Union Hill 15 miles per hour. I was behind a car that was going the same speed. At that time I felt able to estimate the speed of automobiles. I had driven enough to make such observation, as I went up the hill I only pushed the gas pedal down to make the car go 15 m.p.h. I did not push the pedal down to the floor. When I got on top of the hill I turned to my left which would be west. The car ahead of me turned the same direction. That car ahead of me increased its speed to 25 m.p.h. and I increased my speed to 25 m.p.h. When I increased my speed to 25 m.p.h., which was the speed limit on Moss Avenue, I was about 100 feet west of Garfield. Between Garfield and McArthur I would estimate would be 600 to 700 feet. When I was 75 feet west of

Garfield I was still following the car ahead of me. I don't recall whether there was any car behind me. I don't recall whether any cars were approaching me from the opposite direction on Moss, It was at this point, - 75 feet west of Garfield on Moss, - that I took my foot off the accelerator and when I took my foot off, the car didn't slow down. It increased, after I took my foot off. I never put my foot back on and I only pushed it to a point that would make it go 25 m.p.h. to attain that speed. I never pushed it further than that. And it was at that point I took my foot off and never put my foot back on and it continued to pick up speed. After I realized my car was gaining momentum and I couldn't stop it, I went around the car ahead of me. As I went around the car ahead of me I went over the center line and into the east bound lane of traffic to go around that car".

Mr. Mauerman further testified that when he took his right foot off of the accelerator he put the toe of his right shoe under the accelerator pedal and lifted it up; that the accelerator pedal was loose from the rod that goes through the floor and the pedal itself moved up; that while he was doing this his car gained speed and he was getting very close to the car ahead, and he turned his car to the left and as he passed the car in front of him he bent over and tried to pull the rod which had been attached to the foot pedal with his right hand. "I was scared", continued the witness, "the engine was racing. There is a ball on the end of the rod that locks into the rubber cup on the gas pedal. When I reached to get hold of the gas pedal, it was loose and sticking to the floor. When I leaned over I tried to pull it up. My head was then down below the level of the dash-board. When I pulled on the rod it didn't come back. I kept pulling on it. I tried to free the rod.-----I heard an impact on the front end of the car but do not know what caused it and after this impact I recall striking a tree".

Mr. Mauerman further testified that he did not see decedent or her schoolmates at any time; that he had no knowledge of striking anyone; that he was bending down from the time the gas pedal stuck and that he operated the car with his head down for approximately 1000 feet; that he did not know where decedent was with reference to the intersection at the time she was struck and his car came to rest when it hit a tree on the south side of Moss Avenue 300 or 400 feet west of the McArthur Avenue intersection; that he was uninjured, got out of the car, went to a house across the street and phoned his employer and it was while he was there that he first learned his car had struck decedent. Mr. Mauerman further testified that on the day of the accident he attended classes at the High School where he was a student and was taking a course in auto mechanics; that he had a drivers license and had driven automobiles more than a year accompanied by an adult.

Karen Kinkade was called as a witness for defendant and she testified that upon the day in question, as she was driving her Pontiac car up Union Street Hill, there was a car behind her; that she turned left into Moss Avenue and was proceeding west at a speed of 20 m.p.h.; that she increased her speed to 25 m.p.h. and was travelling at that speed between Garfield and McArthur Avenues; that the car behind her, which was the car driven by Mauerman, passed her on the left. "As it passed", testified this witness, "I looked at the car and saw the driver. He was leaning forward, looking down. I did not form an opinion of the speed of the car at that time. Before that I noticed a group of children crossing the street from my left to my right. They were going straight across the street. When the car was passing me the girls were quite aways ahead of me crossing the street. At that time they were starting toward the curb. They were 3 or 4 car lengths, maybe

more, when the car started to pass me. As it passed me on my fender it took a very fast burst of speed and angled slightly to the right and at that time I looked at the girls because I realized they were not quite across the street. I continued to watch the car that collided with the little girl. At the time of the collision the driver of the car was still forward on the wheel. He didn't see them. After that car hit the little girl it angled out sharply to the left and continued on an angle down the street and crashed into a tree".

On cross examination Miss Kinkade testified that as Mauerman went around her car she was travelling 25 m.p.h. and that she could see the girls in the street. "As he went around me", continued this witness, "I saw him behind the wheel looking down. When he struck the girl he was still behind the wheel looking down. I was able to see his head in the rear view xxxxx window of his car. He was leaning forward on the wheel. I could see his back leaning down, through his window. He went in the opposite lane to go around me and when he got around my fender there was a sudden burst of speed, - very fast, very sudden -. When he struck the girl she was stepping on the curb to my right, the north curb. She was one step from stepping on it. His automobile to get over to her angled very sharply.---------I watched the Mauerman vehicle after it struck the girl and it went across McArthur some distance and then crashed into a tree".

Thomas Mariner, at the time of the occurrence, was driving a half-ton pickup truck on Moss Avenue proceeding in an easterly direction. When he was east of the McArthur intersection 30 or 40 feet he observed a group of girls as they were crossing Moss Avenue. The girls were then in the center of Moss Avenue and Mariner saw the Mauerman car approaching the girls. When it was forty feet

east of the Mariner car the Mauerman car was going 35 to 40 miles per hour. "Just before it got up to me", testified the witness, "it seemed to zoom ahead like all the power in the world was pushing it and it struck the girl and knocked her into the air and continued with terrible power across McArthur and I saw the girl go through the air and hit the sign and hit the ground".

Frank Coates, a police officer, testified that he arrived at the scene of the accident shortly after it occurred and at that time Mauerman told him that his accelerator had stuck and that at the point of impact he, Mauerman estimated his speed at 65 to 70 miles per hour. Mr. Coates further testified that he examined the car and found that the foot accelerator was disconnected from the throttle rod; that it had a little cup arrangement at the bottom but the pedal was pulled loose.

John Shore testified on behalf of defendants and stated that he was service manager and mechanic employed by the Walker and Werner Repair Shop in Peoria and had been an automobile mechanic since 1932 and had been employed by Walker and Werner since 1945; that he was familiar with the operation of carburetors on automobiles as that was a part of his training and experience; that the Mauerman automobile was brought directly to his place of business immediately after the accident and placed on the south wall; that he examined the carburetor and found the throttle in a locked position and the accelerator pump rod had fallen down in such manner as to hold it open. This witness, the morning after the accident, removed the carburetor and it was offered and admitted in evidence and, during the examination of Mr. Shore as a witness, he demonstrated the position of the carbueretor on the manifold, the accelerator pump rod and its connection when in proper position and demonstrated what caused the accelerator to stick in an open position when the accelerator pump rod became detached.

In addition to the carburetor the witness Shore identified a clip which he testified was a standard part and was installed on a carburetor on a 1953 Oldsmobile. This witness further testified that the Oldsmobile which Mr. Mauerman was driving on this occasion was equipped with vacuum power booster brakes; that the vacuum in the intake manifold increases when the throttle is closed and decreases when the throttle is open; that when the manifold vacuum pressure is decreased there is an absence of vacuum power for the brakes and that it requires great effort to apply the brakes with the throttle open because of the absence of the vacuum power.

Counsel for appellant argue that the carburetor and clip and also the testimony of Mr. Shore is connection with these exhibits had no relevancy to the issues made by the pleadings in this case. The record shows that when the carburetor was offered in evidence, plaintiff made a general objection and a specific objection that the carburetor had not been properly identified. The trial court stated in view of the fact the witness said he could not identify the carburetor as the one he took off the Mauerman car the objection was sustained. After Mr. Shore was interrogated further about the safekeeping of this exhibit after he had taken it off of the Mauerman car, counsel for plaintiff withdrew his objection as to its identity and it was admitted in evidence. The jury was thus enabled to observe this piece of mechanism, learn its operation, and have demonstrated what took place which caused the car to speed out of control.

Counsel for plaintiff also objected to the admission of the clip which Mr. Shore testified was absent from the carburetor when he examined the Oldsmobile following the accident. The objection was that it was not the same clip but a substitute and that the evidence did not show what the tension force on such clip would be. The evidence did disclose that the missing clip

was not available to defendants; that the clip was a standard part, of definite and certain specifications and manufactured and used on all 1953 Oldsmobile carburetors. At the conclusion of counsel's cross-examination of Mr. Shore about the identity of the clip, the witness stated that the tension on or the spring which is on the clip may have been different than the tension at or before the time of the accident. Thereupon counsel for plaintiff stated that there was no showing of exact similarity and that he was objecting because the witness testified that he did not know the tension force of the clip rod. The objection was overruled and the clip admitted in evidence. There were no objections to Mr. Shore's testimony or demonstration except when the witness was asked at the end of his direct examination, to take the clip off before the jury and demonstrate what happens to the rod without the clip in place. At this juncture counsel for plaintiff said: "Object to this, your honor, it has already been done". The objection was promptly sustained and the direct examination concluded.

Instruction No. 13, given at the request of defendant is I.P.I. instruction 70.03. "This instruction," argues counsel for appellant, "suggested to the jury that they should decide whether a party violated the statute on the occasion in question; that the instruction suggests that decedent may have been contributorily negligent or that she failed to exercise due care. It is plaintiff's position", continued counsel, "that, on the undisputed evidence no act or omission of decedent, whether negligent or not contributed to her death". At the conference on instructions, when this instruction was being considered, counsel for plaintiff said: "Object, because it doesn't take into

consideration relative distances and speeds or circumstances surrounding the transaction. It might lead the jury to believe it is an absolute right of way which it is not". All the evidence is that decedent was crossing Moss Avenue, not at any cross-walk but in the middle of the block. The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. (Blumb vs. Getz, 366 Ill. 273, 277, 8 N.E. 2d 620). Under the facts as disclosed by this record, the instruction was appropriate and it was not error to give it.

Counsel for plaintiff insists that this record discloses that Mauerman, as a matter of law, was guilty of negligence that proximately caused the death of plaintiff's intestate; that no defense was presented and that plaintiff was entitled to a directed verdict or, there should have been a judgment for the plaintiff notwithstanding the verdict on the issue of liability, on plaintiff's post trial motion. In this court, counsel insists that the judgment of the trial court should be reversed and the cause remanded with directions to submit the case to another jury on the sole issue of plaintiff's damages. In the alternative, counsel insists that the judgment should be reversed and the cause, remanded for a new trial because the verdict is against the manifest weight of the evidence, and that the trial court erred in giving the instruction referred to and also erred in the admission in evidence of the carburetor and metal clip.

In support of this contention counsel state that the evidence discloses that Mauerman, by his own admission, drove his car, for a distance of 1000 feet with his eyes directed to the floor board, unaware of the condition of the highway, the traffic thereon, pedestrian or vehicular, and blind to everything except the mechanical difficulties of his car. Counsel cite Marshall vs.

Grosse Clothing Co., 184 Ill. 42; Biggerstaff vs. Estate of Nevin, 2 Ill. App.2d/462; Kanne vs. Metropolitan Life Ins. Co. 310 Ill. App. 524; Ceeder vs. Kowach, 17 Ill. App. 2d 203; Kocour vs. Mills, 23 Ill. App. 2d 305 and Suddler vs. National Bank of Bloomington, 403 Ill. 218. The facts in none of these cases are analogous to the facts in the instant case.

It is the theory of appellees that upon the occasion in question, Mauerman was presented with a situation of sudden emergency when the accelerator of the car he was driving for the first time, stuck when it was in an open position and that, as disclosed by the evidence, he, Mauerman, acted as a reasonably careful person would have acted under like circumstances. Counsel for appellee further insist that the evidence discloses that decedent was twelve years of age, in the eighth grade in school, and of above average intelligence; that she crossed a busy street in the middle of the block; that she made no effort to look for traffic; that she was talking and still in the street at the time she was fatally injured while her six companions were either in the grassy area between the sidewalk and the street or on the sidewalk. Under these facts, counsel argue, that the jury were justified in finding that decedent failed to exercise due care for her own safety.

The issues of negligence, contributory negligence or due care, and proximate cause are questions of fact to be determined by the trier of fact. These questions become questions of law only if it can be said that all reasonable minds would reach the conclusion, under the evidence, that such evidence does not establish negligence, due care or proximate cause on the part of the person charged therewith. Even where the facts are admitted or undisputed but where a difference of opinion as to the inferences that may legitimately be drawn from them exists, the

questions of negligence, proximate cause, and contributory negligence must be submitted to the jury. It is primarily for the jury to draw the inferences. (Piper vs. Lamb 27 Ill. App. 2d 99, 108, 109; Ney vs. Yellow Cab Co. 2 Ill. 2d 74, 117 N. E. 2d 74, 51 A.L.R. 2d 624; Cloudman vs. Beffa, 7 Ill. App. 2d 276, 284, 129 N. E. 2d 286; Vasic vs. Chicago Transit Authority 33 Ill. App. 2d 11, 180 N.E. 2d 347). And a verdict may not be set aside merely because the jury could have found differently or could have drawn different inferences, or because judges feel that other conclusions than those drawn by the jury would be more reasonable. (Lindroth vs. Walgreen Co., 407 Ill. 121, 135; Kahn vs. James Burton Co., 5 Ill. 2d 614, 126 N.E. 2d 836.)

Upon the former trial of this case defendant testified that he pushed the gas pedal down as far as it was and that was what caused his car to go 70 miles per hour. Our interpretation of all of defendant's testimony, as indicated by our former opinion, was that defendant pressed the accelerator until it stopped by its contact with the floor board. Upon both trials, the testimony of all the witnesses was substantially the same. Defendant testified on both trials, that he knew, from his instruction at the school he was attending, that the carburetor would only open as far as the gas feed went down; that if the transmission was placed in a neutral position, the motor would become disengaged and that the car would stop if he applied the brakes or turned off the ignition key.

We have set out quite fully the evidence of defendant, Mauerman, as well as the evidence of the two eye-witnesses, Thomas Mariner and Karen Kinkade. Whether decedent was in the exercise

of due care and caution for her own safety, and whether defendant Mauerman was guilty of negligence and whether his negligence or decedent's lack of due care proximately contributed to cause the death of plaintiff's intestate, were the determining issues. These issues have been submitted to two juries and both juries found the issues for the defendants and the findings of both juries have been approved by two judges who saw and heard the witnesses and considered the arguments of learned and experienced counsel.

The original complaint made not only Mauerman and Short but also R. A. Lynch and W. H. Nichols defendants. Upon the first trial verdicts of not guilty were returned as to defendants, Mauerman, Lynch and Nichols. No verdict was returned as to defendant Short but the trial court rendered judgments in favor of all defendants in bar of the action. Upon appeal to this Court the judgments were reversed as to defendants, Mauerman and Short, and the cause remanded for a new trial as to them. As to the other defendants, the judgments were affirmed. (Joseph Admr. vs. Mauerman, 21 Ill. App. 2d 119).

From a careful review of this record, no errors appear which requires a reversal of this judgment. The judgment appealed from is, therefore, affirmed.

JUDGMENT AFFIRMED

McNEAL, J. Concurs

SMITH, J. Concurs

48536 ABST.

WILLIAM REID, Plaintiff-Appellant,) Appeal from the Village Court of Maywood, Cook County

vs.

LUCILLE A. REID, Defendant-Appellee.)

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

In a later proceeding, after a property settlement agreement was approved and merged in a decree for divorce, the plaintiff was ordered to comply with the decree in relation to certain insurance policies and plaintiff appeals from such order.

The parties were married on November 21, 1940, and lived as husband and wife until January 1, 1960. When the marriage was dissolved on May 5, 1960, the parties agreed upon a property settlement which gave the defendant wife custody of the four children ranging from eight to eighteen years of age. Another provision provided that the husband was to pay all of the children's college or graduate school expenses, up to a maximum of $2,000.00 each year for each child. This obligation continues even after the children reach their majority. In addition, the parties agreed to a provision concerning the insurance policies then held by the husband. It requires:

> 13. That the insurance presently held by the husband shall be retained and set up either by means of the present policies or by an insurance trust, to provide that in the event of the husband's death before all children are of age or completed college or graduate school, the income from said policies or trust shall be immediately available for use to pay for their support or expenses at college or graduate school; that said policies or

> insurance trust shall be set up so that the children are the irrevocable beneficiaries of the proceeds from said insurance; that the husband shall pay the premiums and charges thereon; that the husband shall retain the right to decide in what amounts the children shall share said insurance.

The supplemental proceedings here commenced with the plaintiff's petition seeking to compel the defendant to re-enroll their eight year old son in his former grade school. The defendant answered and filed a cross-petition alleging that plaintiff failed to properly comply with provision 13 of the settlement agreement set forth above.

After several extensions given plaintiff to answer the petition, the matter came on for hearing on April 27, 1961, and after hearing arguments of counsel, and the parties being present in open court, an order was entered reciting that plaintiff appeared to have failed to comply with provision 13. The order stated:

> ***To fulfill the requirements of said decree said William Reid, shall retain all the policies that he held at the time of the entry of the decree, shall continue to pay all the premiums on same as they become due, shall by means of said insurance policies or an insurance trust, provide that in the event of his death before all children are of age or completed college or graduate school, the income from said policies or trust shall be immediately available for use to pay for the support of said children or expenses at college or graduate school, shall provide that the said children are the irrevocable beneficiaries from said insurance, but in such amounts as William Reid shall from time to time designate and further said William Reid shall not provide in said policies that he retains the right to surrender, assign, or borrow on any of said policies.***

On October 6, 1961, the parties filed a stipulation and supplement to record which stated:

> ***That at all times herein mentioned plaintiff-appellant's beneficiaries to the insurance policies possessed by plaintiff at the time of the entry of the decree, was and still is either defendant-appellee, herself, or one or more of the minor children of the parties hereto, or plaintiff's estate without exception. ***

Plaintiff is appealing only from that portion of the foregoing order that prohibits him from retaining the right to surrender, assign or borrow on any of said policies of insurance.

Plaintiff contends the order of April 17th is void in that the trial judge, in effect, re-wrote the agreement, and included terms in the order not agreed to by plaintiff. We do not agree. The plaintiff, having obligated himself to retain the policies for the purposes set forth in his own agreement necessarily restricted himself from surrendering, assigning or borrowing on said policies. If it were not so, plaintiff presumably could place the policies in such a position that they would be valueless and not serve the purpose intended.

In Smith v. Smith, 334 Ill. 370, 382, cited in plaintiff's brief, the trial judge ordered additional security for the payment of alimony to supplement depleted stock given in accordance with the property settlement agreement. The Supreme Court held that "[t]he court could not substitute its notion of security for that definitely agreed upon by the parties and adopted by the court in

its decree." The situation here is unlike that in Smith. The trial court has not ordered plaintiff to purchase additional insurance to supplement or replace the policies held at the time the divorce decree was entered. The order merely requires plaintiff to comply with the terms of the property agreement by prohibiting him from committing acts which would adversely affect the security agreed upon in the property agreement.

Various other grounds are urged for reversal, but in the view we take, we do not consider it necessary to pass upon them. Also, we consider premature the question raised by plaintiff as to how long he is required to retain the policies under his agreement. The order appealed from will be affirmed.

AFFIRMED.

MURPHY, J. and
ENGLISH J. concur.

Abstract only.